Original.

No. 8587 and No. ~~8588~~.

IN THE

SUPREME COURT

OF THE

STATE OF CALIFORNIA.

CHARLES LUX, et al.,

Appellants,

VS.

J. B. HAGGIN, et al.,

Respondents.

Argument for Respondent on Re-Hearing.

JOHN A. STANLY,

STANLY, STONEY & HAYES,

Of Counsel.

PREFATORY.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of California.

Before I consented to argue this cause, in behalf of the defendant and respondent, upon the recent reargument thereof, I had such assurances as led me to believe that by reason of the great public importance of the main questions involved, and the fact there were some one hundred and fifty other cases pending, involving the same question, and awaiting the decision of this cause, counsel would be allowed such time as would enable them to present the case according to their own sense of duty to their client. When the cause came on for re-argument on the 25th ult., the pressure of the engagements of the Court, required that the whole argument should be confined to about six hours and a half, and when this announcement was made, I appreciated the fact that if I appropriated all of that part of the time allotted to the defendant, that I should be unable to discharge my duty, in the manner that my judgment and conscience dictated that I should perform it.

And in my effort to comply with the order of the Court, and to save a small portion of the

defendant's time for another gentleman who desired to be heard, and who I thought the Court desired to hear, I was compelled to run over my propositions in such a hurried manner, that I succeeded in presenting no *one of* them as I thought it should be presented, and some of them I did not even have time to state.

I dislike to assume that anything which I may write is worthy of your Honors' consideration, but inasmuch as my client relied upon me in part, to present his (or its) case upon this rehearing, and in view of the fact, that if the cause is considered to have been re-argued upon the so-called oral argument on the 25th ult., the defendant *has not had his (or its) day in Court*, I am *compelled* to ask your Honors' attention to the printed argument which I now submit for your consideration.

JNO. A. STANLY.

April 15, 1885.

INDEX TO ARGUMENT.

INDEX TO ARGUMENT—(Continued.)

In the Supreme Court

of the

State of California.

CHARLES LUX
AND OTHERS.

vs.

JAMES B. HAGGIN
AND OTHERS.

Argument of John A. Stanly for Respondents.

I approach the consideration of the questions involved in this case with much embarrassment, produced as well by the magnitude of the interest involved as by the fact that a majority of the members of this Court, after argument by able counsel, who tried the cause at *nisi prius*, have united in an opinion as to certain questions involved, which it becomes my duty to antagonize. The great question involved in the cause is the

ownership of or the right to the use of the waters of the flowing streams of this State.

The importance of this great question to the public at large is so transcendent that it dwarfs to almost insignificance the very large amount of money directly involved in the litigation itself.

I know that the Court is as alive to the importance of this question as I can be, and I therefore only refer to it as a ground for the appeal which I make to the Court, not only for that patient hearing, which it always courteously extends, but for that kind consideration which will forbid that your Honors should dismiss the propositions which I may advance as unworthy of careful consideration, by reason of the fact that this may be the first time that they have been presented to this Court in this connection.

This is an action originally instituted for the recovery of damages caused by an alleged private nuisance, and to obtain a decree of the Court abaating that alleged nuisance.

At the conclusion of the presentation of the plaintiffs' case, in chief, in the Court below, the complaint upon plaintiffs' motion was so amended as to eliminate therefrom the action for damages, and to leave the cause as one solely seeking an injunction against the continuance of the alleged nuisance.

The plaintiffs' action is based upon the theory that the common law doctrine usually known and designated as the English law of riparian rights exists as a part of the law of this State.

Plaintiffs' whole case is made by their pleadings to depend upon the existence, as a part of the law of this State, of that rule of the common law of England which is supposed to provide that "every proprietor has an equal right to use the waters which flow in the stream, and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor, and without the consent of the other proprietors, no proprietor can diminish the quantity of water which would otherwise descend to the proprietor below."

After the former hearing, a majority of the Court adopted the pretensions of the plaintiffs in this regard as the law of this State, and held that the grantee of a tract of land acquires, in a natural stream of water running over it, "a corporeal right or hereditament that passes by the grant of the land over which it runs."

In the case at bar, the lands as to which plaintiffs claimed the incidents of riparian ownership were at one time the property of the State of California, and the plaintiffs deraigned their title from the State.

It is expressly recognized, in the opinion of the majority of the Court, that if the defendants, with the consent of the State, had appropriated the water, of the diversion of which the plaintiffs now complain, while the State was the owner of the lands now claimed by plaintiffs, the plaintiffs would not by their grant from the State have acquired any right to the waters in question which would have entitled them to make any complaint as to defendants' act of diversion.

I accept this as the deliberate opinion of the majority of the Court upon the former hearing, *that there is no natural and indissoluble and inseparable connection between the waters of a stream and the lands through or over which it may flow.*

It is manifest that in order to render the right to the use of flowing water an inseparable incident to the land through or over which it may flow the right must be a natural one, and as such, must exist wherever streams and lands are found in juxtaposition, whether the stream be navigable or unnavigable below or above the ebb and the flow of the tide. The history of the jurisprudence of the world shows that there can be no such natural right.

The *nature* of the legal relation between the lands forming the banks of streams and the waters of those streams *must* be ascertained, as the very foundation for the application of *any* law to a controversy such as this, where bank ownership is claimed to give certain rights in the waters of the stream.

If this *legal* relation between the bank lands and the streams is derivable *solely* from the law of nature, then that law of nature must furnish the rules, by the application of which the controversy is to be determined.

If upon the other hand this *legal* relation between the bank lands and the streams is derivable from municipal law, statutory or common, then the rules of this law must govern and control the rights of the parties.

Upon this subject I desire to submit, as the

basis of the argument which I shall present to the Court, the following proposition, viz:

That the riparian owner's rights in the stream and its waters are incidents created by the law of the land, within whose jurisdiction the land and the stream are situated.

The contention of the plaintiffs in this case seems to have been, that the rights of the English riparian owner were *natural* rights, which existed independent of all human laws, and which became at once vested in a bank owner, by virtue of his being the grantee of bank land.

There are many rights of an English riparian owner, and I think that it is but a fair assumption that if one or more of these rights are found to be entirely dependent upon municipal law, that *all* will be held to be so dependent.

By the English riparian law, the rights of riparian ownership were confined to streams in which there was no ebb or flow of the tide; or in streams in which the tide did ebb and flow, in that portion of them only *above* the ebb and flow of the tide.

Those streams in which the tide ebbed and flowed, were *public* waters, as far as there existed a tide. In tidal streams, the gradual accretions to the lands on the banks was public property—in non-tidal streams, these gradual accretions were the property of the owners of the banks.

If an island was formed in a tidal stream, it was the property of the King; an island formed in a non-tidal stream, was the property of one or both, according to circumstances, of the bank owners.

In tidal streams, the public had a right of both navigation and fishery; in non-tidal streams, the bank owners had an exclusive right of fishery.

Where do these distinctions between the rights of riparian owners on different streams or different parts of the same stream come from?

Manifestly not from any *natural* law, but from the municipal law of the land.

When we in this country abandoned the English rule, that the navigability of a stream depended upon the ebb and flow of the tide, did we change a law of *nature*, or one of the *municipal* laws of England?

Now, those portions of the English riparian law, which give the riparian owner a right to an undiminished and an unpolluted flow of the waters of a stream, like these other riparian rights, to which I have referred, owe their origin to that same municipal law—to that same expression of the public policy of the country, having legislative jurisdiction of the subject matter.

The nature of the relation or connection between land and water has been the subject of examination and inquiry and determination by one of the most eminent judicial persons that this country has ever produced.

It would be a useless work and profitless labor for me to follow him—make the same examination which he made, with the view of fortifying the conclusions at which he arrived.

In the case of *Tyler* vs. *Wilkinson*, 4th Mason, 400, Judge Story says:

"Before proceeding to an examination of these points, it may be proper to ascertain *the nature* and extent of the right which riparian proprietors possess to the waters of rivers flowing through their lands."

He then says that he had "read over all the cases on this subject which were cited at the bar or which are to be found in Mr. Angell's valuable work on water-courses, or which my own auxiliary researches have enabled me to reach."

And as the result of this examination of *the nature* of the riparian owner's right, he announces the conclusion that it is "an incident *annexed by operation of law to the land*," and that, naturally and without the aid of this "operation of law" the use of water would be "common."

The connection between the water of flowing streams and the lands through or over which it flows are legally as varied as are the systems of laws and the public policy of different portions of the civilized world.

In that country from which we have derived our system of laws known as the common law, a public policy upon this subject has crystallized into a common law rule, which it is claimed attaches to the land through or over which a stream flows the right to an undiminished and uninterrupted and unpolluted flow of the water.

In most, if not all, the countries where the civil law prevails, a public policy exists which denies to private ownership the running or flowing waters of a stream and preserves all such waters for the common use of the inhabitants of

the territory subject to that public policy, in the manner prescribed by the administrative law of such territory; and even in the States of the American Union which have adopted in terms the common law of England, the rights of the riparian owner are not uniform.

From these considerations it is apparent that something more is necessary than to assert that the grantee of a tract of land acquires in a natural stream of water running over it "a corporeal right or hereditament that passes by the grant of the land over which it runs."

Before this conclusion can be reached or announced, it is indispensable that some law, either statutory or common, should be found and pointed out which gives that effect to the grant.

The burden of showing the existence of such a law is, of course, upon those who assert its existence.

The plaintiffs are here asserting that they have a "corporeal right or hereditament" in the waters of a certain stream, by virtue of their grant of certain tracts of land.

It is for *them* to show and point out the law which makes their grant from the State carry with it this "corporeal right and hereditament."

I believe that it is conceded that no such law of of this State can be found unless it is contained in the Act of April 13th, 1850, "Adopting the Common Law." That statute is as follows: "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of

the State of California, shall be *the rule of decision* in all the Courts of this State."

I contend, with great confidence, that the passage of this statute did not adopt, and was not intended to have the effect of adopting, as a part of the law of this State, that common law rule, which entitles a lower riparian owner to the undiminished and unpolluted flow of the waters of a stream running through or over his land.

In the consideration of this question it is important that we shall consider what was the law of this subject matter which prevailed in this territory prior to its acquisition by the United States and at the time of the formation of the State of California.

If there was any law upon this subject prevailing in California at the time of its acquisition by the United States, that same law must of necessity still be the law of that subject matter, unless it has been changed, modified or repealed by the Constitution or the statutes of this State. I propose to demonstrate by a brief statement of authority that the laws regulating the rights of property in and to the use of water, as they existed in California prior to our acquisition of the country, were utterly and diametrically opposed in nearly every essential particular to the usually received and commonly accepted definition of riparian rights, as known to the common law of England; and I trust I shall be able to demonstrate that these laws which were so in force when we acquired this territory have never been superseded

by the substitution therefor of the common law rule, however they may be changed by statute.

I.

What were the laws in force in California prior to the formation of the State Government upon the subject of water and its uses?

In the discussion of this question, I announce this general proposition, viz: That the fundamental principle upon which all the laws of the former governments of this territory upon this subject were based will be found to be *that the flowing waters of the streams and rivers of the country were dedicated to the common use of the inhabitants, subject to that legislative control which is the equivalent of the exercise of that legislative power which we know as the police power of the State.*

The opinions of Escriche as a commentator upon the laws of Spain have been frequently referred to by the Supreme Court of the United States as a standard authority, and that Court has had frequent occasion to consult his dictionary for the light to guide their decision upon questions of Spanish law, as those laws existed in countries now a part of this country, but which were formerly a part of Spanish America.

In his work, "Diccionario de Legislacion y Jurisprudencia," Escriche defines "*agua*" (water) as follows (page 106, Paris edition of 1867):

"Water is the liquid substance of which the

seas, rivers, streams and springs, ponds and lakes are formed. As water on the one hand is capable of occasioning grave damage, and on the other, is the blood of the earth and the life of the fields, it gives place to questions of much importance for agriculture, which we are going to develop in this article, treating first of the service or burden which lower estates have to receive the waters which naturally come down from the estates above. In the second place, of the right which one proprietor has over the water which rises on his land; and in the third, *of the waters which belong to the public;* and in the fourth, *of the use of the waters which pass between the banks or through an estate.*"

After discussing his second subdivision; viz: "Of the right which a proprietor has over the water which rises in his estate," with the general conclusion that such waters are the private property of the owner of the estate upon which they rise until they escape therefrom, he proceeds on pages 109 and 110 to the discussion of all other waters under the designation of:

"III. *Of the waters that pertain to the public.*

"The waters that are not and cannot be private property pertain to the public; such are the waters of the rivers which of themselves, or with the accession of others, pursue their course to the sea. *These may be navigable or not.* If they are navigable, no one can appropriate to his own use their waters in such a manner as to impede or

embarrass the navigation; but, if they are not navigable, the owners of the territory through which they flow can use the waters thereof for the benefit of their lands or industries *without prejudice to the common use*, or that to which it may have been devoted by travelers, *and with the modifications specified in the laws, orders and decrees referred to under the word 'Acequia'*—(water ditch). Who, how, and when fishing may be carried on in waters that pertain to the public will be seen under the word *'Pesca'*—(fishing).

"IV. *Of the use of the waters that flow by the boundaries or through an estate.*

"The use of the running waters which do not belong to the class of such as no one can make use of without permission from the proper authority, *is to be regulated by municipal ordinances, or by the uses and customs of the country; but, in default of ordiuances and customs, equity and the interests of agriculture dictate the following rules.*"

[Just here I beg to impress upon the Court that *all* of the remainder of this definition of Escriche's is confined to the enumeration of those "rules" which are to regulate the use of such waters "*in default of ordinances and customs.*"

These rules which he gives are *not* applicable where there is *either* a *law* or *custom* upon the same subject. This is a most important consideration, inasmuch as these equitable rules which he lays down to govern *in the absence* of positive law or custom have been in this very case referred

to and cited, disconnected with their context, as evidence of *the law* itself, while Escriche himself expressly says that they are subordinate, *both* to "ordinances and customs."

The Court will not fail to notice that these "equitable rules" laid down by Escriche are in themselves greatly at variance with the rules of the common law upon the subject.

The following are these equitable rules which this authority says should control the use of waters in the *absence* of law or custom:]

"1. The waters of fountains and springs are the property of the owners of the lands on which they have their sources, or of the fields below, that have acquired a right to their use, so long as they (the waters), remain within the limits of their boundaries, but so soon as they issue therefrom, and become running waters, *aqua profluens*, they become *common property*, pertaining to the first occupant, so far as he may have need therefor.

"2. The *first* who can make use thereof, are the owners of the estates by, or through which they flow.

"3. If the running water flows between two estates, belonging to different owners, each one of these can use the water for the irrigation of his lands, or for other purposes, but he shall not be permitted to use the whole, but only the portion to which he is entitled, because both have equal rights, and the one can, therefore, object to the other using the whole of the water, or, indeed,

any considerable portion, more than that to which he is entitled.

"4. When the water flows through an estate, the owner of the estate can make use thereof, at his will, since, inasmuch as he owns both banks of the stream, he is not required to subject himself to the interests of any other owner of land bordering on the stream; but, when the stream issues from his lands, it must be returned to its natural, or ordinary course, this owner of land not being permitted to entirely consume, or absorb the water, or to give it another direction, because it does not belong to him, in ownership, but only in the use that he can make of it, on its passage through his estate.

"5. Then, since every owner of land bordering a stream is entitled to the use of the water that flows along the boundary of his land for the purpose of irrigating the same, it is clear that he can open irrigating ditches, or canals, and even construct dams, flood-gates, or other works for the purpose of conducting the water to the points desired on his land, provided he do not cause it to overflow the fields above, contrary to the wills of their owners, or to inundate those lying below, or cause the water to flow below in such a manner as may cause damage, nor retain the water in such a manner as that others shall be deprived of what may be needed for their *accustomed* irrigation.

"6. None of the owners of the lands bordering streams shall be permitted to construct works on the estate of another without the consent of the owner, nor even interfere with a dam or flood-gate thereon for the purpose of giving his own land a greater supply of water, since as all have the same rights, the works shall be made in such a manner as to give an equal distribution of the water.

"7. *But this principle of equality in the distribution of water is subordinated to the interests of agriculture*, which generally require that a larger amount of water be devoted to estates of the greater extension, as required by the Roman law. However, inasmuch as the field of the greatest extent does not always need the most water, the maxim of the Roman law must not be applied without certain restrictions.

"8. Thus, as the owners of lands above cannot absolutely deprive those who own lands below of the use of water, since they are required to return the water to its natural course after having used the same, save the inevitable loss caused by irrigation, in the same manner, in an inverse sense, the owners of water mills, fulling establishments, or other industrial establishments have not such right to all the water that they need for the driving of their machinery as will entitle them to the right of totally depriving of water the owners of estates lying above. *However, with regard to mills in a country in which*

there are but few, and when, on account of a drought, all the water is needed, the irrigation must be suspended for the common good, so long as the season of drought continues.

"9. The owner of property, bordering on a stream, can alienate his right to take water, by renouncement, cession, or other mode, in favor of the owner of property, lying on the other shore, or of the owner of property, lying below; and if, having two estates, he disposes of one of them, he may reserve the exclusive right, to the use of the water, for the estate that he retains. An owner of an estate, bordering on a stream, can also acquire, with respect to another, the exclusive right to the water by means of prescription.

"10. The owner of property, bordering on a stream, cannot, without the consent of the other owners of property similarly situated, who are interested, concede to a third party, with prejudice to such owner, the right to take water from the same current, or on his land, nor himself use the water to irrigate another estate belonging to him, but which is not situated on the banks of the stream; this right can, however, be acquired by prescription.

"11. When an estate, lying on a stream, is divided among several co-owners, or commoners, in such a manner that the portions that are designated or adjudicated to some of them, and that constitute so many other estates, which do not border on the stream, each one, notwithstanding, retains his right to the water in the same manner

as he did before the decision was made, although no stipulation may have been made in relation thereto.

"12. The owner who may augment the extent of his estate, bordering on a stream, by the acquisition of lands contiguous thereto, cannot take more water than that which he was before entitled to use, to the detriment of other parties interested, since, if he had such power, he could, in time, render illusory the rights of other owners of property on the stream.

"13. The bed or channel *(alevo madre)*, or earth, by or through which the current passes, must be distributed among the proprietors of the lands bordering on the stream, in proportion to the frontage of their estates on the stream, in case it be left dry from the effect of time, by the action of some powerful force, or on account of a change in the course of the stream. *(Law 31, Tit. 28, Part. 3. See Aluvion, Avulsion, Isla y Rio.)*

"The rules that we have laid down are applicable to running waters *that belong to no one*, and that flow through natural channels; but not to the ditches or canals that have been made by the hand of man. Therefore, if along the boundary or through an estate, passes a ditch pertaining to a mill or other establishment, I cannot make use of the water therein for my land, unless I may have acquired a right to do so by prescription; so that, if the owner of an establishment does not enjoy the use of the ditch by the right of property, but only by virtue of the servitude imposed upon my ground, as must be presumed, so long as

the contrary is not proven, although I cannot do anything to diminish the use of the servitude with respect to the object for which it was established, I can, at least, make use of the surplus water, either when the establishment is not in operation, or when the ditch is supplied with a superabundance of water. (*See Acequia.*)

"We have here spoken of water only so far as it serves for irrigation. In the article relative to *Fisheries* we will speak of those who have a right to engage therein, and of the manner and times in which they can exercise such right."

Now, if these rules of "equity" were the only rules defining the rights of riparian owners under the Spanish law, those rules differ in so many essential particulars from the rules of the common law as to demonstrate that there are no uniform rules upon the subject, founded upon the law of nature.

What propositions does this authority establish?

1st. That under the Spanish law there were *two* characters of water—public and private;

2d. That *private* waters were such as originated upon an estate, and remained thereon;

3d. That all other waters belonged to the "*public*";

4th. That all public waters were subject to "common use";

5th. That this "common use" was the subject-matter of governmental control and regulation;

6th. That in the absence of all positive law upon the subject, the "common use" of these waters was regulated by "*custom*";

7th. In the absence of both positive law and custom, regulating the "common use," that use was to be controlled by certain equitable principles *subordinated to the interests of agriculture.*

Could there by possibility be a clearer recognition of the devotion of any subject-matter to *public use*, and the subjection of that public use to governmental control and regulation?

Escriche in his definition of "Bienes Comunes" (common property), page 372, says:

"Things that not belonging to any one with respect to ownership pertain to *all*, so far as the use is concerned, as the air, *the water*, the rain, the ocean and its beaches; it being understood that the beach is that portion of land that is covered by the water, at the highest tide. (*Law 3, Tit. 28, Part. 3. See Water, Ocean and Beach.*)

"In a stricter sense, common property *(bienes comunes)* is understood to be that which belongs to many persons by right of dominion and which is undivided. Common properties of this class, in which the whole pertains to each one of the commoners, or co-owners, must be divided among the owners whenever any one of them petitions therefor, and there exists no just cause why it should not be done, in view of the question, as

to whether the community is beneficial or prejudicial; either because it is a constant source of discord, or because the property is daily depreciating in value, since all of the commoners are more desirous of deriving profits therefrom than of incurring expense in the care thereof, and because under an apparent equality there is a real inequality, since the stronger is enriching himself at the expense of the weaker.

"This cannot be applied to the community property of husband and wife, since the same reasoning does not apply thereto; nor, to the community established between partners in commerce, since the object in this case is to acquire and not to enjoy."

Here again, is a direct and positive assertion, that the use of *water*, like the use of the air, the rain and the ocean and its beaches, is the "common property" of *all* the inhabitants.

As the use of the one of these "common" things was subject to governmental control and regulation, so necessarily were they all.

Things of common use, in their very nature must be subject to governmental control and regulation; otherwise, many of those who ought to enjoy the use, would be deprived thereof.

That there is no warrant for the claim advanced by one of appellant's counsel, that these Spanish and Mexican laws upon which I rely, as establishing the common or public character of the property in the uses of flowing waters, was confined to the inhabitants of small settlements or

pueblos, under the former governments, is apparent from the very next subject matter of which Escriche treats in his Dictionary. This subject matter is "Bienes Concejiles" (town property), page 372. Thus recognizing that these town properties are something other and different from the subject matter of which he had just treated as "Bienes Comunes," or common property.

But the concession that the former government *did* regulate and control, by virtue of its governmental powers, the use of water, as to these so-called small settlements or Pueblos, is a concession of the substance of that for which I am contending, viz: *the power of the government over the subject matter.* The exercise of the power, even to a small extent, and as to limited areas, is the assertion of the right to exercise the same power to a greater extent, and as to the entire country.

In further consideration of this question of the *public* character and the *common use* of waters, I refer the Court to Escriche's definition of the word "Cosa" (thing), page 526:

"Everything that has a physical or moral existence, save man, except in those countries where human slavery exists, because slaves were, and still are, considered as *things.* Jurisprudence treats principally of things, with relation to their susceptibility of possession; but, so soon as they fall into the possession of a man, they take the denomination of *property* (*bienes*) without thereby losing the character of things. Thus it is that *the waters*, the trees and the wild animals are things, so long as they are in the possession of no

one; but, so soon as any one takes possession thereof, they take the character of *property* (*bienes*). In short, the name of *things*, in jurisprudence, has a more comprehensive signification than that of *property* (*bienes*): the first is applicable to all that may be possessed, and the last to all that is found in our estate or patrimony. *Things* are the second object of the law, as *persons* are the first and *actions* the third.

"According to the laws of *Tit. 28, Part. 3*, things are divided, with respect to their possession and dominion:

"1. In *commons* (*comunes*), which are things that, not pertaining privately to any one with respect to ownership, belong to all mankind, so far as relates to the use thereof, as the air, the rain-showers, the ocean and its beach.

"2. In *public places*, (*publicas*) which are those that, with respect to ownership, pertain to a people or nation, and, with respect to the use, to all the inhabitants of the district, such as *rivers*, shores, ports and public roads.

"3. In *concejiles or universilarias*, (town or city properties) which are those that, with respect to ownership, pertain to a city, village or place, and, with respect to the use, to all and each one of the inhabitants thereof, as the fountains, woods, parks and pasture grounds. Of those of this class, there are some, the use of which is not permitted to each inhabitant in particular, since they are considered as the patrimony of the people, the products of which are to be devoted to objects of

general utility, as will be seen in the article on "*Proprios.*'"

I will trouble the Court with one more citation from Escriche, and which, I think, will put this subject matter beyond all question.

He says (page 64), under the title of "*Acequia*" (water ditch):

"The ditch, or canal, by which water is conducted, for irrigation, and other purposes.

"No one can, on a navigable river, open a ditch and or canal which may embarrass the navigation, that which may already have been made, whether it be a new or old one, must be closed or destroyed at the expense of the owner, because the public good must be preferred to individual benefit. *(Law 8, Tit. 28, Part. 3.) But the river not being navigable, any resident of the pueblo, or settlement, through which the stream passes, may extract therefrom a portion of its waters, and construct a ditch* (acequia) *for the irrigation of his lands, or for the driving of the machinery of his mill, or for any other purpose whatever that may be of interest to himself*, provided he do so *without prejudice to the use of the community* or to the end to which it may have been devoted by the pueblo (settlement), *with the understanding that if the ditch should have to pass over lands not belonging to him, royal or municipal, it will be indispensable to obtain license from the owner, from the King or the Council.* Thus it is declared by *Law 8, Tit. 28, and Law 18, Tit. 32, Part. 5*, and this is commonly

the opinion of the authors, *based upon said laws, and the Roman laws.*

"The instruction to magistrates, of the 15th of May, 1783, *(Law 27, Tit. 11, Book 7, Nov. Rec. 1, Article 48)*, directs that, *for the purpose of promoting the fertility of the fields by using all of the water that can be beneficially applied thereto*, ditches (*acequias*) may be constructed for conducting water from the rivers, at points that may be most convenient, without prejudice to its course, and to the localities and districts lying below; endeavoring, also, to discover waters that are subterranean, that the same may be applied as well to the use of mills, fullers' establishments, and for the driving of machinery necessary in grinding, and woolen manufactories, as for the working of stone and timber at the least cost.

"By the royal decree of the 31st of August, 1819, for the promotion of agriculture, "*ayunta mientos*, communities, companies, corporations or private individuals are permitted *the necessary permission of the government being first obtained*, to construct at their own cost, ditches or canals, *for new irrigations, taking the water from rivers which afford an abundant supply*; collecting in one place, the waters of a number of *arroyos*, or springs; *or conducting waters from the bosom of the mountains. This permission, or favor*, grants an exemption from any increase of tithes and first fruits of the harvests of twelve years, on the lands that effectively receive the benefits of this irrigation. This increase of tithes and first fruits is understood to be the result, deducting the amount

paid by the land to the legitimate owners, while it was in a dry condition, from its production under irrigation; which regulation has to be made in accordance with the brief of His Holiness, of the 31st of October, 1816, for three years anterior, computing the fertile with the sterile, said tithes and first fruits remaining untouched to their legitimate owners.

"The counting of the twelve years must commence, with respect to grain, pulse, and all other plants whose vegetation is completed *in one year*, at the time of the commencement of the irrigation; in vine plantings at the conclusion of the *seventh year*, from the time of the planting; in those of the olive and algarroba at the end of the *tenth year*, and in those of the mulberry at end of the *twelfth year;* the King reserving the right to dictate the regulations to be observed with respect to other classes of trees or shrubs, if the necessity of their culture, in any provinces of the kingdom, should be represented to him. Those who may enclose these lands of new irrigation by a wall of solid structure of the height of at least six Castilian palms above the level of the land shall *for two harvests more* be exempt from the tithes and first fruits referred to, and for *one harvest more* if the enclosure should be of dry stone or a hedge. The exemption conceded to those who plant on lands of new irrigation vines, olives, algarrobas, or mulberries, is understond to apply to the provinces of Andalucea, Ethemadura, Miericia, or Cartegena, Valencia, the Belereae Islands, Pethuises, and the Canarias; *since in the*

other parts of the kingdom, in which vegetation is retarded, one year more is conceded in plantings of the vine and mulberry, and two years in those of the olive and algarroba. These same *favors* are extended *to every community or individual that applies to one or many tracts of land* the benefits of irrigation by any other means than those that do not require special permission from the government.

"Notwithstanding what has been heretofore said, no person or corporation can (*distraer*) distract in their sources or courses the waters of springs or rivers that from ancient times have watered lands lying lower down, which lands cannot be deprived of benefits *already acquired* for the purpose of favoring others, who, for the only reason that they have not before availed themselves thereof, appropriate to themselves rights *already appropriated* by others. (Royal order of 5th of April, 1834.)

" He who enjoys the benefit of the water of a ditch *that passes over the lands of another* must keep the channel in such a condition that it does not widen, rise, or deepen, or cause damage to the land through which it passes, (*Law 4, Tit. 31, Part. 3*), and he is also required to cleanse the ditch so that the owner of the estate through which it passes may not be disturbed thereby *(Laws 7 and 15, Tit. 31).* When the ditch belongs to several persons, each one must aid in its repairs and cleansing on the border of his estate. *(Law 15.)*

" If the ditch that passes over an estate belongs to a mill or other establishment for the benefit of

which it was constructed, the owner of the estate cannot use the water on its passage for the irrigation of his lands, because the water of the ditch has become private property; but he may acquire this right by contract or other title, or by prescription. We speak with the supposition that the owner of the establishment is also the owner of the ditch, since if he does not enjoy this by right of property, but only by virtue of a servitude, which is to be supposed until the contrary be shown, then the owner of the estate encumbered with a simple servitude of *aqueducto*, may make use of the water that may not be necessary for the use of the mill or establishment."

I have italicized those portions of this translation, which seem to me to throw light upon, and to be decisive of the question under consideration.

I submit that this authority establishes the following propositions as the former law of this territory, viz.:

1st. That water could not be diverted from a navigable stream so as to "embarrass the navigation" thereof;

2d. That the waters of non-navigable streams were dedicated "to the use of the communities" through which they flowed;

3d. That any one of the community or settlement could divert the waters of a non-navigable stream for the irrigation of his lands, *whether those lands were on or off of the stream*;

4th. That the *only* difference between the right of an owner *on* the stream and one whose lands were *off* of the stream, was that the latter had to obtain the permission of the *public authority* when it was necessary for him to construct his ditches over the public lands for the conveyance of water. And by this affirmative requirement of obtaining the consent of the public authority to construct a ditch over public lands, and the failure to require the like consent of a private owner, over whose lands it might be necessary to construct a ditch, the inference seems irresistible that the public policy of the country attached to the private ownership of land the burden of a servitude for such ditches as were necessary for irrigation purposes ;

5th. That before any one—bank owner or back proprietor—could take any waters from a stream, "*the necessary permission of the government*" *had to be* "*first obtained.*"

This authority also evidences the existence of that ancient public policy of Spain as to its American possessions, *which necessarily involved the dedication to public use of all the flowing waters of Spanish America which could be used for irrigation purposes*, without detriment to navigation, and which rendered it *indispensably necessary that the government should retain full and absolute control over the use of those waters*, and involves an assumption and exercise of government control over the streams and their waters not only incompatible with any assumed *natural* right to the use

of the water by the bank owners, but especially incompatible with the English riparian rights.

The royal decree of August 31st, 1819, referred to by Escriche, is, in effect, a *Desert Land Act*, as we would denominate it in this country. It extends an invitation to all persons to settle upon the public domain which needs irrigation to make it productive, and extends them the following inducements to do so, viz :

1st. That upon application the Government will give them "*the necessary permission*" to divert the waters for irrigation purposes from rivers "which afford an abundant supply," or of "*collecting in one place the waters of a number of arroyos or conducting waters from the bosom of the mountains.*"

(This right is called a "*permission or favor.*")

2d. That the persons who thus settle upon and irrigate these desert lands shall be exempt for a series of years from certain taxation which would otherwise result from the increased productiveness of the soil, caused by the lands being irrigated.

3d. That for works of irrigation, constructed with the view of more than ordinary *permanence*, that there should be an additional term of exemption from these taxes. And,

4th. That as to those portions of the Spanish dominions other than those enumerated (including California), this period of exemption

from these taxes is extended for one year longer than the term specified.

In all this we don't find the slightest reference to any superiority of right to the use of waters of streams in a bank owner, over the owner of land through whose lands the stream does not run. Upon the contrary, there is an express recognition of the *back* owner's right to use the water, in the provision *which is made, requiring him to keep his ditches in order, which pass through the lands of other proprietors.*

It will be noticed, that in the original decree of Aug. 31, 1819, there is not even a saving clause that these *new* irrigations shall not take the water from prior *appropriators* in the same stream. This right of prior appropriators was saved by the Royal order of April 5, 1834, after California ceased to be a part of the Spanish dominions. And this saving clause is confined strictly to rights "already appropriated."

Now, how would it have been possible that this public policy for the settlement of these lands could have been effectuated, without a dedication to public use of the *waters* which were available for their irrigation, and the retention of the governmental power of control and regulation of their use? I submit that it would have been impossible.

The inducements and promises held out by the sovereign for the settlement and improvement of his desert domain, carried with them an obligation and duty upon the part of the sovereign,

that that indispensable thing—water—for the accomplishment of the purposes had in view, should be, and forever remain, dedicated to public use, subject to *public control* and *regulation*.

Under our system of jurisprudence, a settler upon public lands, who had gone thereon and made his improvements under invitations and inducements such as these held out to him by a State, would be held to have a *contract* right as against the State, which would prevent the State from so disposing of the waters, that it could not afford him the facilities of irrigation, which constituted the main inducement to his settlement and improvement.

And I suppose that this same principle was as obligatory under the civil law as under the common law.

I think, before I conclude with this branch of the case, that I shall be able to satisfy the Court that this Royal decree of Aug. 31st, 1819, referred to by Escriche, was not the enunciation of any *new* public policy upon the part of the former sovereign of this country, but was but a reiteration of a public policy, which had its inception at least two centuries before that date and coeval with the first disposition of the public domain in Spanish America.

To the same point, namely, the public character of all waters under the Spanish and Mexican law, I ask the Court's attention to chapters 2 and 3 of Galvan's Ordenanzas, to be found in Hamilton's Mexican Law, pages 110 to 127. From this authority it appears that *every river is a public one,*

and *all flowing waters are public property;* that no one has a right to use the waters of a public stream without permission of the government; that a land owner whose land does *not* bound on a stream, and through which the stream does *not* run, may have the right to take the water from the stream for irrigation purposes, and when such right is given to him by the government, such an owner has either a right of way over or a right to acquire by proceedings analogous to our exercise of the right of eminent domain, a right of way over the land bordering upon the stream for an aqueduct for the conveying of the water to his land; and that when the water supply was found insufficient, resort was had to distribution by turns, some using water in the daytime and others at night; some during certain hours and others during other hours of the day; "*because what belongs to the whole public should be so controlled that all may have a share in the distribution.*"

An examination will show that from the earliest period of which we have any record, the sovereign authority, whether the King of Spain or the Congress of Mexico, in providing for the distribution and the colonization and settlement of the public domain, had constant reference to the different qualities of land and their adaptability to different purposes, which in themselves *necessarily involved this public character of the waters of the country and the assertion of the sovereign control of the same.*

In Rockwell's Spanish and Mexican Law, at page 445, *et seq.*, will be found "extracts from the

regulations for the government of the province of California, by Don Philippe, Governor of the same, dated, in the royal presidio of San Carlos de Monterey, 1st of June, 1779, and approved by His Majesty in a royal order of the 24th of October, 1781." Section 5 of these regulations directs the distribution of the pueblo lots, so that each inhabitant shall have "two *suertes* of *irrigable* land and the other two of dry ground." Section 8 provides "that the new colonists shall enjoy, for the purpose of maintaining their cattle, the *common* privilege of the water, * * * to be designated *according to law* to each new pueblo." Section 9 imposes the duty upon the new colonists of making "the necessary trenches for watering their lands, * * * and likewise open the principal drain or trench from a dam and the other necessary public works for the benefit of cultivation." Section 10 provides that after the expiration of five years the new colonists and their descendants shall pay a tax to the sovereign of "one-half of a *fanega* of Indian corn for each *irrigable suerte* of land, and for their own benefit they *shall be collectively under the direct obligation of attending to the repair of the principal trench, dam and auxiliary drain.*"

Section seventeen provides for the issuance of titles to Pobladors of *waters*, and this without reference to whether those waters flow by, along, upon, or through the pueblo land.

Section eighteen provides for Alcaldes, and one of the functions of those officers is *the distribution of water privileges* without reference or regard

to the relative situations of the lands upon which the privilege is to be used, and the stream from which the water is to be taken.

I refer to the decree of the Mexican Congress of August 18, 1824, respecting colonization, (Rockwell's Spanish and Mexican Law, pages 451–2). Section 12 of this decree provides: "No one person shall be allowed to obtain the ownership of more than one league square of 5000 varas *of irrigable land* four superficial ones of land *dependent on the seasons*, and six superficial ones for the purpose of rearing cattle."

Irrigable land may be, and in fact often is, situated at a distance from the stream which is to afford the water for irrigation, and wherever the land was irrigable, whether situated upon or off of the stream which is to furnish the water, it was regarded by this decree as being *four* times the value of cultivable land, dependant for its moisture upon the seasons only, and six times the value of land which was only suitable for the purposes of rearing cattle.

We find the same recognition of the different qualities of land in the general rules and regulations for the colonization of the territories of the republic of the 21st of November, 1828. (Rockwell, pages 453 and 454). The 14th subdivision of these regulations provides "A minimum of *irrigable* land to be given to one person for colonization shall be 200 varas square; the minimum of land called *de temporal* shall be 800 varas square, and the minimum for breeding cattle shall be 1200 varas square."

Again in the National Colonization law of the 4th of January, 1823, (Rockwell, page 617 *et seq.*,) we find the same recognition and distinction. Article 6 of that law (page 618) provides "In the distribution made by government of the lands to colonists for the formation of villages, towns, cities and provinces, a distinction should be made between grazing lands, destined for the grazing of stock and lands suitable for farming or planting *on account of the facility of irrigation.*"

In none of these laws which place a distinctive *value* upon land *susceptible of irrigation* and which provide for the disposition of that land in a manner different from other lands, is there the slightest qualification that the land which is to be susceptible of irrigation is such as is located on a stream.

It is manifest that in the mere granting under these laws of lands *susceptible of irrigation*, there would be involved an obligation or duty upon the part of the government to permit its grantee to use that water which made it *susceptible of irrigation.* As to the public character and the public control over all flowing water, I learn from "Hall's Mexican Law," sec. 29, page 15, that:

"The general laws governing the disposition of the crown lands until 1786, consisted of numerous decrees and ordinances, commencing in the year 1513," and that these decrees, etc., were collected and published in 1680 in Title 12, Book 4, of the "Recopilacion de las Indias."

The same author (Hall) gives a translation of this Title 12, Book 4, of the "Recopilacion de las

Indias," in the 3d Chap. of his work, commencing with Sec. 32 in page 17.

I invite the attention of the Court to certain portions of these laws, all of which, it will be seen by a note to page 17, are derived from decrees and ordinances of the years 1513, 1523, 1525 and 1596.

Law First (Hall, Sec. 32) makes provision for the "distribution of pueblo lands."

This law recognizes the distinction between irrigable and dry land, and their respective values to the Government and the inhabitants of Pueblos.

In establishing the measures in quantities of land which shall be granted to the two different characters of settlers—esquires and laboring men—it provides that a *peonia* shall shall consist of a house lot, 50x100 feet; one hundred *fanegas* of cultivable land for wheat or barley; ten *fanegas* of land for corn; two *huebras* of land for an orchard; *eight huebras of dry land for planting other trees,* etc., etc., and that a *caballeria* shall have *five* times the same quantities of each kind of land, *i. e.*, "ten *huebras* of land for orchards," and "*forty of dry land for the planting of other trees.*"

Here is a recognition that orchard land must be very opposite to the character of *dryness*, which was supposed to be suitable for the planting of *other* than orchard or fruit trees, viz., that it must be such as is susceptible of irrigation.

Law Eight (Hall, Sec. 39, page 20).

This law recognizes the distinction between petitions for lands only and petitions for lands *and* the *distribution of waters for the use thereof.*

It shows that a petitioner for "*lands for sugar plantations*" (which can only be made upon wet or irrigable lands) was expected to unite with his application for the land itself a petition for the *distribution* to him of the *waters* which were necessary to make the land available for the purpose for which it was wanted.

Law Thirteenth (Hall, Sec. 44, page 21):

"*We order the Viceroys to inform themselves as to the lands which there may be that are irrigable, and that they order the cattle to be taken therefrom, and that said lands be sown in wheat*, unless the owners have titles to this quality of farms."

This law is as old as 1612. (See note 3.)

Law Eighteenth (Hall, Sec. 49, page 24):

"We order that the sale, benefit and composition of lands be made with such consideration that the Indians be left with, above all, what lands shall belong to them, * * * *and the waters and places of irrigation*, and the lands in which they have made ditches (*acequias*) *for irrigation*, or any other benefit with which by their personal industry they have fertilized, shall be reserved in the first place, and in no case can they be sold or alienated."

I ask the attention of the Court to those provisions of "Law First," referred to above, which provide for the quantities of land to be granted to

settlers. From the best information that I have been able to obtain, if the population of a pueblo contained 50 individuals, entitled to these grants of pueblo lands, the grants of the same to that number would more than exhaust the entire four square leagues of pueblo land. This consideration is, of itself, sufficient to show that the lands, the disposition of which was contemplated by this law, were not intended to be confined to those lands included within *four leagues*, which were *subsequently* dedicated to each pueblo. This law of the Recopilacion is understood to have been a digest of a decree of Charles V, of about 1523, while the *first* mention of the *four leagues* to be given to a pueblo is to be found in Book 6, Title 5, Law 6, and is understood to be the digest of a decree of Phillip 2nd of about 1596.

In Dwinelle's "Colonial History of San Francisco," at page 11 of the "Addenda," will be found a translation of the "Plan of Pitic" of Nov. 14th, 1789, and which is understood to have been the law relative to all pueblos formed after that time.

This "Plan of Pitic" is full of recognition of the public character of the water, and of the power of the government to regulate and control its use.

By its first section the officer whose duty it was to select a location for the pueblo was enjoined to do so, with reference to "the advantages offered by its lands, *fertilizing through the benefit of irrigation by means of the large canal constructed for that purpose.*"

Its 6th section declares that the "*water privil-*

eges" of the pueblo shall be "*for the common benefit.*"

Sec. 7 I quote in full:

"The residents and natives shall enjoy equally the woods, pastures, *water privileges*, and other advantages of the royal and vacant lands that may be *outside* of the land *assigned to the new settlement* in *common* with the residents and natives of the adjoining and neighboring pueblos, *which bounty and privilege*, shall continue as long as they are not changed or altered by His Majesty, in which case they shall conform to that which has been provided in the royal orders that *may be* issued in favor of the new *possessors* or owners."

Sec. 13 provides that after the commons and the common pasture grounds of the pueblo have been laid out, "the Commissioner shall make a careful calculation of all the useful and productive land, *which by means of the ditch can be irrigated*," and divide the same in a given manner.

The 14th sec. provides, that a certain portion of the land "*that have the advantage of irrigation*" shall remain the property of the pueblo, to be administered by the "Mayordomo," for the benefit of the common fund.

Sec. 16 provides that the other "*irrigable*" land shall be distributed to the settlers.

Sec. 19 provides that:

"The advantage of *irrigation* being *the principal means of fertilizing the lands*, and the most

conducive to the increase of the settlement, the commissioner shall take particular care *to distribute the waters so that all the land that may be irrigable* might partake of them, especially at the season of Spring and Summer, when they are most necessary to the cultivated land in order to insure the crops, for which purpose, availing himself of skillful or intelligent persons, he shall divide the territory into districts (partidos) or hereditaments, marking out to each one a trench or ditch, starting from the main source, with the quantity of water which might be regulated as sufficient for its irrigation * * by which means each settler shall know the trench or ditch by which his hereditament shall be irrigated."

Sec. 20 provides :

"In order that these (the settlers) might enjoy, with equity and justice, *the benefit of the waters in proportion to the need of their respective crops*," there shall be appointed annually an officer for each trench, who shall have charge of the distribution of the water to each tract of land according to its requirements, and whose duty it is made, in default of the owner of the land, *to irrigate it for him* at the owner's cost.

I respectfully submit, if there were no other law of the former sovereign of this territory than this single one of the "Plan of Pitic," from which the absolute control of the government over the water and the dedication thereof to public use could be inferred that this *one* law is of it-

self most amply and abundantly sufficient to establish the fact of this dedication.

The object and purpose of the law was to promote the establishment of settlements in the country.

The whole law is based upon the assumption that *the territorial limits of its application* (and not merely any particular locality within those territorial limits) was of that character that the use of the waters for irrigation purposes was indispensable to the production of the food necessary to the sustenance of the people who might settle thereon. These settlements were, therefore, ordered to he made with particular reference to the susceptibility of the land to irrigation. The waters which could be used for this purpose are declared to be for the "*common benefit.*"

The lands are to be divided between settlers, so that each may have a portion which can be irrigated.

The distribution of the waters is to be made a public officer, and so important was it that *all* the land which could be, should be, irrigated, that this public officer was enjoined to irrigate himself those lands whose owners might neglect to do so.

It was certainly not the policy of the Spanish Government to confine the settlement *and improvement* of the whole country to the four square leagues of each pueblo. When it not only recognized, but declared, as it did in this "Plan of Pitic" that the facilities of irrigation were a necessary and indispensable prerequisite to the maintenance of the people of every pueblo, and

that the water available for that purpose should be for the "common benefit," that recognition and declaration of the fact that *all* of the lands within the limits of its application might need the same facilities of irrigation in order to support the population which was invited to occupy them, and that all water which might be available to irrigate them should be held for the "common benefit."

The very purpose of the establishment of pueblos was that they should be centers of population, which were gradually to occupy, subdue, improve and render productive the surrounding and neighboring country.

That the waters which were available for the irrigation of the irrigable lands *within* a pueblo's limits, were dedicated to public use, cannot be questioned. Would it not be singular, indeed, that the inhabitants within these limits should be so favored—should possess this great advantage and privilege—while the inhabitants of a surrounding and neighboring country—a country for the development of which the pueblo was established—should be denied them? All *reason* forbids such a conclusion and *forces* the result, that that which was indispensable to be dedicated to public use, in order to maintain and give bread to the *nucleus* of the population, was intended to be likewise dedicated to the public use of the population itself.

Again, this "Plan of Pitic" necessarily involved the continuous assertion of the power of the government over its flowing waters. It cannot be pre-

tended that the power to establish a pueblo under this "Plan" had been lost, if the government had therefore conveyed a tract of land bordering on a stream, at a point lower down the stream than the point at or near which it might be desirable to establish such a pueblo. Neither can it be contended that, *after* the establishment of a pueblo, if the government should convey a tract of land bordering upon the stream from which the water for the use of the pueblo was taken, *higher up the stream* than the location of the pueblo, that fact would impair the right of the pueblo to the use of the water that had been dedicated to its public use.

These considerations seem to me to demonstrate that no grants of lands made by the former Government can be construed as conveying any *right as against the Government* to any water that may flow through the land granted. If the public policy of the country required the establishment of a pueblo in the vicinity of a stream, *all* of the waters of which would be required for the use of the pueblo's lands, a private proprietor on the stream *below* the pueblo could not be heard to complain of the pueblo's diversion and use of such water, nor could a private proprietor on the stream *above* the pueblo be allowed to divert the water thereof, so as to deprive the pueblo of that amount of water which would be dedicated to its public use. Certainly, no grant of land in California made by the former Government *after* the promulgation of this "Plan of Pitic" can be construed as embracing such a grant of

the water flowing through it as would prevent the Government, in pursuance of its general public policy, from dedicating the use of that water, *and all of it*, if necessary, to the public use of any pueblo thereafter established in the vicinity of the stream, and this for the manifest reason that this "Plan of Pitic" was as much a law of the land as were the laws under which the grants of land were made, and both being in *pari materia*, neither could be so construed as to defeat the purposes of the other. As a matter of fact there were but five ranches granted by the former Government in California prior to the 14th of November, 1789—the date of the "Plan of Pitic"—all of these being in Los Angeles county, and aggregating a total of some where near 33 leagues, or 165,000 acres. ("Table of Land Claims"—Appendix to Hoffman's Reports.)

But this "Plan of Pitic" goes very much farther than the assertion of the right of the Government to dedicate the waters of the country to the public use of pueblos.

The seventh section of the "Plan" treats of waters *outside*, of the lands, which may be "*assigned* to the new settlement," and it expressly, and in terms, dedicates those waters, so far as they constitute the "*water privileges*" of the "royal and vacant lands," to the "*common*" use of the residents and natives of all the adjoining and neighboring pueblos, and expressly declares that this "bounty and privilege" shall always continue, unless *thereafter* changed or altered by royal order in favor of new possessors or owners.

The people who were to have the "*common*" use of these waters "outside" of the pueblos were not those *only* who were the inhabitants of *some* pueblo. It necessarily included all the population who might have occasion for that use, and could avail themselves of it.

The use of the word "natives" in this section indicates this intention. The new settlements were made for Spaniards, but the waters were for the "common" use of both natives and Spaniards, and in addition to this, the whole population was under the jurisdiction of *some* pueblo, whether they resided upon or outside of the four leagues of pueblo land, and this "bounty and privilege" was evidently intended for *all*.

In 1871 the Republic of Mexico caused the general laws of the Republic to be codified. I ask the attention of the Court to the following sections of that Code (See Hamilton's Mexican Law, page 39):

"Art. 7. Property of public ownership is divided into property of *common use* and property of special use.

"Art. 8. Property of *common use* are those things which may be used by all of the inhabitants under the restrictions established by law or by administrative regulations.

"Art. 9. The foregoing article comprehends: First, the seashore, which is understood to be that part of the land which is covered by the water at ordinary high tide. Second, harbors,

bays, anchoring grounds, *and streams.* Third, *rivers, navigable or not*, their beds and mouths. Fourth, bridges, highways, roads and canals constructed and preserved at the expense of the State. Fifth, banks of navigable rivers in so far as their use is indispensable for navigation. Sixth, lakes and lagoons which do not belong to private individuals. Seventh, streets, plazas, fountains, and drives of the town. Eighth, palaces, monuments, and national edifices destined for offices and other public establishments."

It will be observed by the note of the author that these articles of the Mexican Civil Code are intended to be a digest and statement of the law of the same subject-matter as derived from the Partidas and in the Novissima Recopilacion. This codification was the work of Mexican lawyers—men who were familiar with the laws they were codifying, who possessed the double advantage over us of access to and ability to consult in their native tongue all of the authorities bearing upon this question, and they here say that streams and rivers navigable or unnavigable, under those laws are and were absolutely dedicated to public use, withdrawn from commerce and subject *only* to that legislative control to which all of the property dedicated to the common use of the people is subject.

I submit that these authorities are sufficient to show that the law of water and its uses, which was the law prevailing and in force in California at the time of the acquisition of the Territory of the

United States, was diametrically opposed in every essential particular to the common law doctrine of riparian rights as here asserted. I beg special attention to the differences between the two systems in one or two respects :

1st. The common law, as contended for in this case, makes the waters of the flowing stream *a part of the land through which it flows.* If all the land through which it flows is private property, then all the water is private property. The law of California, when we acquired the country, makes all streams and rivers, *navigable or unnavigable*, the property of the sovereignty of the territory, to be held by the sovereignty in trust for the *common use* of the inhabtants of the territory, according to rules and regulations to be prescribed by that sovereignty.

2d. The common law strictly confines the use of flowing waters to the owners of the banks through which it flows. The law of California, when we acquired the territory, provided for the use of those waters for *irrigation* purposes by the owners of lands susceptible to irrigation, whether the river or stream did, or did not flow through, or by such lands.

If this Court was to choose or elect between these two systems, the temptation would be great to comment upon, and to try to show the great superiority of the old Spanish and Mexican system for the special needs and requirements of California over the common law system. And I refrain from doing so only for the reason that,

according to my conception, the adoption of any system upon this subject is essentially an Act of legislation, and as such, one with which this Court has no concern except to declare what the Legislature has done upon the subject. I submit that I have established the proposition, that at the time of the acquisition of this territory by the United States, *all* of its flowing waters had for centuries been absolutely dedicated to the public use of its inhabitants, subject only to the governmental power of control and regulation.

SECOND.

Has this policy of the Mexican law which constituted the law of the subject matter in California at the date of the acquisition of the country by the United States been superceded by the common law of England? I submit not, and for several reasons.

1st.

The adoption of the common law by the Act of 1850 was only designed and intended to furnish *a rule of decision* for the Courts of this State as to rights vested under other laws. That Act was never intended to *create* rights which had not previously existed, or to *divest* rights which then existed, and more particularly that statute was not designed to, and cannot be construed as, a *grant* of any rights, much less a *sur-*

render by the State of a sovereign legislative power.

As long as California was subject to the civil law of Spain and Mexico, the owners of its lands through or over which a stream of water flowed had no more right to the use of the waters of the stream than did any other inhabitant of the territory who was permitted to make use of it by the governmental or administrative regulations which controlled its use. I submit that it would be a perversion of all rules of construction to hold that a statute, adopted for the express purpose *and the only purpose*, of providing *a rule of decision* of private controversies, should have the effect of going behind the controversy itself, and *creating a right* to which the rule of decision is to be applied.

Suppose that at the time of the adoption of this statute an action had been pending between A and B, in which A had complained that B, whose land was *not* situated on the stream, was using a larger quantity of the waters of the stream than he had been permitted and allowed to use by the governmental or administrative regulations of the former government to the detriment of A, whose lands were *on* the stream. The action comes to trial. B proves that he is only using the quantity of water, and as he was permitted and allowed by the former government to do. But the Court says: "While that is true, the Legislature of this State has adopted the common law *as a rule of decision* for the Courts of this State, and the effect of this is that, whereas your lands are not

on the stream, you are not entitled to use *any* of its waters, and whereas A's land being on the stream he is entitled to have *all* the waters flow down to his land, the Court is compelled to restrain you from diverting *any* of the water." What would this Court have said to such a construction of the Act adopting the common law? Would it have held that this statute, which by its very terms is limited to the prescribing of a rule of decision *for the Courts*, could be made to operate to vest a title to property, which would not have existed if it had never been passed, or that it could operate to *divest* a right to the use of the waters of a flowing stream which would have existed but for the passage of the statute?

There can be no question but that the State of California succeeded to all the governmental powers of sovereignty which were possessed by the former governments of Spain and Mexico. Among these powers these former governments held and possessed the Legislative power of regulating and controlling the use of the flowing waters of the territory. These were not personal sovereign rights, but they were governmental powers held by those sovereigns as a trust for the inhabitants of the territory. To these powers the State of California succeeded. When and how has the State divested itself of these powers of government which it received in trust for the citizens of the State?

Under the Constitution of this State, these powers of government *could* not be alienated, abandoned or surrendered by the State in any

manner or by any process. Certainly no court will hold that such powers as these were intended to be surrendered by inference only or by a forced construction of the language of a statute passed for an entirely different purpose. As I understand it, it has always been a cardinal rule of construction that no *inferences* can be drawn from an Act except such as may be indispensably necessary to effectuate the manifest purpose of the Act itself. If this rule is applied in the construction of the Act of April 13th, 1850, all difficulty upon this subject will be at once removed. Its manifest purpose, as *expressed* in the Act, was the *single* one of prescribing a rule of decision for the Courts of this State.

In the very nature of things, this rule of decision so prescribed was not and could not have been intended as the equivalent of saying that in all controversies existing or to arise, the rights of parties litigant are to be determined as if those rights were created or had their origin in a country where the common law prevailed. Any such construction would have utterly destroyed a large class of valuable rights which had vested under the laws of the former governments of the territory, a result forbidden not only by the law of nations, but by the treaty of Guadaloupe Hidalgo and by the express provision of Art. 1 of the Schedule of the Constitution of 1849.

I take it that this Act of April 13th, 1850, adopting the common law as the rule of decision, means simply this: That all controversies between individuals are to be determined by the ap-

plication to the facts of the rules of the common law applicable thereto in so far as those rules may be consistent with the preservation of *all* rights, public and private, theretofore existing.

This seems to me to be the manifest as well as the expressed design of the Act; to infer from the Act that it was intended to change existing rights of either a public or a private character—to take a right from one individual and confer it upon another, or to divest the State of property it held in trust for the common good and give it to a few persons, or to divest the State of any of its legislative powers—is not permissible by any rule of construction heretofore known.

And yet that is precisely the legal effect of holding that this Act of April 13th, 1850, adopted as a part of the law of this State, the common law rule of riparian rights. Under the Spanish and Mexican law, the owner of land, which could be irrigated had a right, subject to legislative control and with governmental permission, to the use of waters for that purpose, whether his land was situated on or off of the stream—*such owners are to be deprived of these rights to all waters, and all streams are given to the bank owners.*

Under the Spanish and Mexican law the sovereign held all rivers, *navigable and unnavigable*, in trust for the *common use*, subject to such regulations as the sovereign might prescribe—this sovereign—the State—*is divested of this trust property; it is deprived of all powers of legislaiion thereover, and its use is delivered over as a whole to the absolute private ownership of a few persons.*

These serious consequences ought not to be worked by drawing an *inference* from any statute. To give any statute a construction which would necessarily lead to the consummation of such changes in the status of property—public or private—the words of the statute *must* be such as are incapable of any other construction.

On the 22d of April, 1850, nine days after the passage of the Act adopting the common law, the same Legislature passed a "Act to abolish all laws now in force in this State except such as have been passed by the present session of the Legislature." (Statutes of 1850, page 342). This Act contained a proviso "that no rights acquired * * shall be affected thereby." What I contend for is that the Act adopting the common law shall be read as if it contained a similar proviso. It certainly cannot be that an inferential repeal can have a broader effect than that which is worked by an Act, the purpose of which was expressly to repeal. So read, the Act of April 13th, 1850, adopting the common law as a rule of decision, leaves unimpaired, not only those rights which individuals acquired under the laws in relation to water and its uses which prevailed under the former governments of California, *but the rights of the State* as the trustee of the people to preserve all the flowing waters of the State for the common use of the people and to regulate the use thereof. Of course, there can be no pretense that the rights which are preserved by the proviso to the Act of April 22d, 1850 are *only* the rights of *individuals*. The language of the pro-

viso is broad and comprehensive—"no rights acquired," by anyone capable of acquiring, "shall be affected thereby." That the public had and possessed rights of various kinds cannot be questioned. Bridges, highways, and roads are some of these *rights*, and which were held by the former sovereigns of this territory in trust for the *common use* just as they held the waters of all rivers navigable or unnavigable. Who succeeded to the ownership of the bridges, highways, and roads which existed in California at the time of the acquisition of the country by the United States? The State of California unquestionably as the successor of all the sovereign powers of government of the former government. Did the State lose its title to these bridges, highways and roads by the repeal of the laws under and by virtue of which they were acquired? Did the property of a road-bed revest in the land owner over whose land it was run, because the road had been taken in a manner not warranted by the principles of the common law?

These rights necessarily vested in the State immediately upon the formation of the State government—it was the only sovereign; there was no one else in whom they could vest, and they are preserved by the statute to the same extent as are the rights of individuals. We are not without authority upon this question.

In *Hart* vs. *Burnett*, 15th Cal., 530, *et seq.*, the principal question was as to the character of the

title which the pueblo of San Francisco had to its pueblo lands.

It was decided:

1st. That the pueblo lands did not pass upon the acquisition of the territory to the United States, for the reason that they had been *dedicated* by the *general* public law or *public policy* of the former governments to the pueblo. These general public laws and this public policy of Spain and Mexico being evidenced by the same authorities (in part, at least), to which I have referred as evidencing the dedication to public use of the flowing waters of the territory.

2d. That as the pueblo held these lands in trust, they would be held in a similar manner by the city of San Francisco, as its successor. As they were withdrawn from commerce when held by the pueblo, so likewise were they withdrawn from commerce in the ownership of the city. When this decision was made the Act adopting the common law had been for years on the statute book; but it never occurred to any of the eminent gentlemen who were interested in that case to advance the theory that this Act adopting the common law, or the Act of April the 22d, 1850, repealing the civil law, deprived the city of San Francisco, as the successor of the pueblo, of this trust property, notwithstanding it must have been known to these gentlemen that it was one of the cardinal principles of the common law that a municipal corporation could not hold property in

trust unless specially authorized to do so by its charter.

By the repeal of all laws theretofore in force in this territory, which was made by the Act of April the 22d, 1850, that very law—whatever it may have been—which authorized the pueblo of San Francisco to hold its pueblo lands in trust, was repealed. But this repeal did not deprive the city of San Francisco, as the successor of the pueblo, of this property, or destroy the trust upon which it was held, and this for the reason that it was a vested right—not vested in an individual, but in the public. It was entirely competent for the Legislature to have prohibited the city of San Francisco, as a successor of the pueblo, from having anything to do with these pueblo lands in any manner. But this would not have destroyed the title to the lands or the trusts upon which they were held; its only effect would have been to make the State the trustee instead of the city. In truth and in fact, the State was substantially the trustee, inasmuch as by the exercise of its sovereign power of legislation it not only controlled and directed the execution of the trust, but varied and changed the purposes of the trust.

What then is the difference between the tenure of these pueblo lands and the tenure of the rivers, navigable or unnavigable, of the State? In all essential particulars they were identical. Both had been dedicated to public use by the sovereign authority of the former governments. Both had been withdrawn from commerce by the laws or public policy of the former governments.

In both public rights had been created by the public policy of the former governments; in both the State, as the successor of the former sovereigns, had succeed to the power of regulating the administration of the trust.

The laws of the former sovereignties of the country, to which I have referred the Court, and from which I have deduced the dedication of the flowing waters of the country to public use, evidence the existence of a public policy, which, without that dedication, *could not exist*, much more clearly and cogently than was shown in *Hart* vs. *Burnett* that the public policy of the same sovereignties had dedicated to the public use of pueblos four square leagues of land.

In fact, these two public policies were inseparable, and were so interwoven and mutually dependent, the one upon and with the other, that the distinction of one necessarily destroyed the other.

The public policy which dedicated four square leagues of land to each pueblo was based upon the necessity of the inhabitants to produce the means of their existence from the cultivation of the soil, and in the same breath which creates this dedication, the fact is recognized and proclaimed that to render the soil productive of those means of existence, the application of water thereto *artificially* was indispensable.

Take away this dedication of water to public use—or which is the same thing, deprive the governmental authority of the power to regulate and control its use—and this public policy, which dedi-

cated the four square leagues of land to each pueblo, is necessarily gone.

Suppose that, after the establishment of a pueblo—the admeasurement and allotment to it of its four square leagues of land—and the construction of its canals and ditches for irrigation purposes and the distribution of the lands among the inhabitants, as provided in the "Plan of Pitic," the former government had attempted to dispose of those waters which were to have fertilized these pueblo lands to the riparian owners on the stream, would not this pueblo and its inhabitants have had cause to complain of the bad faith of the government? Would not those inhabitants have been justified in saying, "You invited us to come and settle these lands; you promised that we should have the *privilege* of using the water on these lands, in order that they might be made productive, and it is not *just*—it is not *equitable* that you should now deprive us of that use of the water?"

If the former sovereign could have done this, it would only be for the reason that it possessed a governmental power which was not subject to the restraint of law. Certainly *this government*, under similar circumstances, could exercise no such power (the power to give the waters to the riparian owners, not being a power of regulation, *but of absolute disposal*)—and it is equally certain that the former government never attempted to exercise any such power.

I ask the Court to bear in mind that pueblos were but *settlements* of people—there were no limits to the number that might be established.

The purposes for which they were to be established were to promote the settlement, development and cultivation of the country generally—and not *exclusively* within the limits of the pueblos themselves. *They* were but the aids and the means to this *general* settlement and improvement, and those things which the policy of their establishment showed were a necessity to their existence, *as such aids*, indicates with unerring certainty, the necessity of those same things to the successful settlement of the country *generally*. When the government of Spain, in providing and devising means for the settlement, improvement and cultivation of its Spanish possessions, determines that the establishment of centers of population is the proper mode, *and* that in order that these centers of population may be able to obtain from the earth a sufficiency of its fruits to sustain life, that their lands should be susceptible of irrigation, it adopted a public policy as to the use of the waters of the territories generally—inside and outside of pueblo limits—which is inconsistent with any other theory, than the absolute dedication of those waters to public use, subject to governmental regulation.

It would be an anomalous condition of affairs, which would result in an established public policy, to the effect that the use of water should be a public use—"common"—within the narrow limits of a settlement made as a nucleus for a larger and surrounding population, while outside of those narrow limits, and as to the lands which their establishment was to develop, that it should not

be a matter of public or common use, but of that character which might become individual property.

I submit that no comparison can be made, of the arguments which were advanced in *Hart* vs. *Burnett*, with the view of sustaining the proposition, that the four leagues of pueblo lands had been dedicated to public use by the public policy of the former sovereigns of the country, and of those which I have suggested in favor of the proposition that all the flowing waters of the territory were likewise dedicated to public use, except to the very great advantage of the proposition which I have urged.

Those same principles and rules which admitted of the preservation of the pueblo lands to the public use, demand the preservation of the public use of the waters of the country. If one was destroyed by the adoption of the common law and the repeal of the laws under which they were created, then the other was likewise necessarily destroyed.

If, notwithstanding the adoption of the common law and the repeal of all laws of the former governments in California, the city of San Francisco held the lands of the Pueblo of San Francisco in in trust, because and for the reason that the former government had so *dedicated* them *by its public policy*, then can any reason be given why the State should not continue to hold in trust for the *common use* of the inhabitants of the State, the waters of the rivers of the State which had been *dedicated* to that *common use* by the same *public policy* of the former governments ?

By way of supporting the construction which I have given to the very plain statements of the laws of Spain and Mexico which I have cited, I will direct the attention of the Court to an authority which I think goes to the full extent of holding that where a former government has made a dedication to public uses, that the government succeeding to its sovereign powers *and property rights* takes both its governmental and property rights subject to a dedication so made, and cannot divert the property so dedicated to any other purpose. In *New Orleans* vs. *The United States*, 10th Peters, 662 *et seq.*, the United States asserted a right to a strip of land in front of the city of New Orleans. The city claimed that the locus had been dedicated *to public use* by the governments of France and Spain prior to the cession of the territory to the United States.

The Court finds that by the *public policy* of France all towns or cities fronting upon a river were allowed a strip of land fronting upon the river for a "quay;" that upon the early maps of New Orleans this strip of land was designated as a "quay," and has been continuously used by the public as such. After examining the French law, the Court, on pages 723 *et seq.*, passes to the consideration and examination of the laws of Spain, and says:

"The fundamental laws of the Spanish nation, and which are understood to be alike binding on the King and the people, are found in the Partidus and the Recopilacion." (Now, this Partidus and Recopilacion, as I have before shown, are the

sources of the identical law to which I am here appealing as the law which *dedicates* all rivers—navigable or unnavigable—to the *common use*). And the Court then proceeds to quote from these authorities to show that under the laws of Spain the *commons* of a town or city are dedicated "*to the common use of all*," (page 724, and says (page 725): "A faithful observance of these laws would have preserved the rights of the city as to the commons, free from invasion. *No law was cited in the argument which showed the power of the King of Spain to alienate land which had been dedicated to the public use;* and it is clear that the exercise of such a power *would have violated the public law*, which is understood to have limited the exercise of the sovereign power in this respect."

"The King of Spain, like the King of France, had the power to give permission to construct buildings on grounds dedicated to public use *without injury to the public rights;* but this does not show that either sovereign had the power to alien such lands."

And again (on page *731) the Court say:

"The land having been dedicated to public use was withdrawn from commerce, and so long as it continued to be thus used *could not become the property of any individual.* So careful was the King of Spain to guard against the alienation *of property which had been dedicated to public use* that in a law cited *all such conveyances are declared void.* * * * *

"That both the Kings of France and Spain could exercise a certain jurisdiction over this common and other places similarily situated, has been stated. *But this was a police regulation*, and was rightfully exercised in such a manner as not to encroach upon the public use. This seems to be the result to which a careful examination of the laws and usages of both countries must lead us."

And the Court holds that notwithstanding the broad and comprehensive language of the treaty between France and the United States conveying to the United States "all public lots and squares, vacant lands," etc. The United States acquired no right of any kind to the strip of land which was so found to have been dedicated to public uses by the former governments.

In this case was urged as an objection to the conclusion at which the Court arrived that there was no being *in esse* in whom this right could have vested, cities under French and Spanish law having no corporate existence, and as to this the Court say (page *713):

"It is not essential that this right of use should be vested in a corporate body; *it may exist in the public*, and had no other limitation than the wants of the community *at large*."

The capacity of the *public*—unorganized and without any body politic—to *take* and to *own* those things which are dedicated to *public use* is most forcibly illustrated by this case. The land which was here so *dedicated* did not pass by the

treaty to the United States, for the reason that by its *dedication* to public use the former sovereign *did not own it.* His title thereto had passed out of him, and had *vested* in an *unorganized public* during the period of his sovereignty. The title did not pass to the State of Louisiana, for there was no such State; it did not vest in the city of New Orleans, because it had no *corporate* existence.

The title to this public use simply remained in the *public*, where it was vested upon its creation.

The legislative power of control of the use, the Court held, did not pass to the United States, for the reason that that government could exercise no police powers. This power of legislative regulation of the public use remained in abeyance until the formation of the State government of Louisiana, and immediately thereupon became vested in that government *as one of its police or legislative powers.*

If by the treaty the government of the United States *could not* have acquired a title to that property which had been dedicated to public use, it is manifest that the State government, when formed, could have no *title* to the same property.

The grant of the treaty was *to the United States.* That grant carried *all* public property rights owned by the former sovereign; it left no such property rights to be vested in the State.

The State, therefore, could acquire or obtain no other right or title to property which had been so dedicated to a public use by a former sovereignty of the country than the legislative power

of controlling and regulating the manner in which that public use should be enjoyed.

And that is exactly the position which I maintain that the State of California occupies to the flowing waters of the streams and rivers of this State.

The plaintiffs and appellants are here asserting *a title* to the waters involved *from* the State of California. From what source did this State obtain any title thereto, which it could grant? It certainly got no *title* from the former government, and there can be no pretense that the United States has ever attempted to give it any such title.

It certainly requires no argument to support the proposition that the King of Spain as the former sovereign of this country had a right to *dedicate* any part or portion of the sovereign property to the *common use* of the inhabitants of the country. His power of dedication was not limited to *lands* for highways—for plazas or streets of pueblos—for commons or other pueblo purposes. The whole territory in all of its parts and in all of its incidents was *his* property. He could dispose of it in such manner and to such purposes as his sovereign will might dictate. There is no principle of law which either forbade him or any other owner to *dedicate* water to public use, with precisely the same effect as would follow the *dedication* of lands to the public use of a pueblo.

And the violation of the right of the public to the public use of waters involve just the same character of consequences as would flow from the

violation of the public right to the use of land dedicated to public uses.

Every grant of land made by the former governments in the now State of California were made in the view of the existence of this public law of the land, that the flowing water of the streams of the territory were reserved for the common use of the inhabitants of the territoy. The man who obtained a grant bordering upon a stream of water took his grant with the knowledge that he only had the right to use the waters of that stream in a manner which would be consistent with the *common use* thereof by all the inhabitants who might be permitted to use it by the police power of the locality. Further, he took his grant with the knowledge that other grant holders whose lands did not border upon the stream might have a right given them by the power that regulated the public use to go to that stream through his land and upon his land to make ditches to convey the waters of the streams to their lands for irrigation purposes.

This law of the public uses of the waters of the territory entered into and formed a part of every grant of land which was ever made in California by the former governments of the country, and the holders of those lands granted by those governments which do *not* border upon any stream of water are just as much entitled to participate and share in this public use of water as is a holder of a lot in this city entitled to participate and share in the public use of one of its original streets or plazas.

Why is it that lands marked on a plan of a town as streets, alleys, plazas, and other public places are deemed to have been dedicated to public use? Because they evidence an *intent* upon upon the part of the owner to *dedicate* them for that purpose.

As to *waters* in the Spanish possessions in America, this *intent* to dedicate them to *public use* is manifested in a much more convincing manner. The public *intent* to so dedicate them is *expressed* not only as clearly as language could do, but in *general and public laws*, which the Supreme Court of the United States says were as binding on the sovereign as upon the people. And in addition to this expressed intent to make the dedication, we have a public policy upon the part of the former governments in relation to the disposition of their public domain and the settlement of their territories which would be utterly defeated unless these waters were dedicated to public use. As I have shown, from the earliest periods of which we have any record, it was the *policy* of Spain as well as of Mexico to distinguish in the granting of the public domain, lands which were susceptible of irrigation from such as could not be irrigated.

Those which could be irrigated were granted in much smaller quantities than such as could not be irrigated. This was the *public policy* of Spain and Mexico relative to the granting of the public domain. How was this policy to be carried carried out and effectuated unless the waters which were available for the irrigation of the

lands which were granted in the smaller quantities by reason of their being irrigable were to be devoted to the *common use?*

It is to be noted that in the selection of the lands which are to be disposed of in the smaller quantities by reason that they were capable of being irrigated there is no requirement that they should border upon any stream of flowing water.

This public policy of the public character of the use of water was one involving, not simply the pleasures, the convenience or the tastes, but the very *life* and *existence*, of the people. Upon it they depended for their *bread.* It not only involved this indispensable thing for the the existence of the people, but it involved the revenues and the treasury of the Government. The laws distinctly recognized the *increased value* to the Government as an agency of revenue, of lands which could be fertilized and improved by the artificial application of water thereto.

I respectfully submit that the considerations which I have advanced in this connection, and the authorities which I have cited establish the proposition that *all* the waters of the flowing streams of California had been dedicated to the public use centuries prior to our acquisition of the country; that the only right which the State acquired to those waters was the sovereign right of legislating as to the manner in which that public use should be enjoyed; that the State acquired no rights to such waters which it could *grant* to the riparian owners or others.

If the State could not dispose of these waters by *grant*, it certainly could not do so indirectly by adopting the common law *as a rule of decision for its Courts.*

But suppose that these considerations and authorities do *not* make out a case of *absolute* and irrevocable dedication of the flowing waters of the State to public use. Then, I submit, they do show :

1st. That the laws upon the subject of water and its uses which prevailed in California at the time of the formation of the State Government were diametrically opposed in every essential respect to the common law doctrines of riparian rights as here asserted ; and

2d. That under the law of the land upon that subject at the time of the formation of the State Government certain *rights* of some kind to the use of the flowing waters of the State were vested in the public and in the owners of those lands granted by the former governments which do not border upon the streams.

To change these antecedent laws so that the waters of the State should cease to be the property of the public and become the *private* property of the owners of the banks of the stream —and so as to deprive the land-owner whose lands do not border on the stream of his *then* existing right to use the waters of the stream, and to confine its legal use to the owners of the banks of the stream, was not merely the substitution of one entirely different system for another system,

but it would work an invasion of rights which then existed. Can such consequences be made to follow from a three-line enactment of the Legislature which, upon its face was intended for another and different purpose?

The most unfavorable view for the respondent which the Court can possibly take of this question is *that under the former governments of California, the right to the use of the flowing waters of the country continued to be a subject-matter of sovereign legislative control—a control to which the State of California succeeded.*

Now I ask, can it be pretended with the slightest degree of reasonable probability that the Legislature of this State *intended* by the passage of the Act of April 13th, 1850, adopting the common law *as a rule of decision* to abdicate—to part with and forever alienate this item of the State's sovereignty? Of course no effect can be given to any statute except such as the Court can say that the Legislature *intended* it should have.

I submit that the pretension that the Legislature so intended is so perfectly monstrous that its very statement ought to be its refutation.

2nd.

But there are other equally weighty reasons why it cannot be held that the effect of the adoption of the common law as a rule of decision was to import into the law of this State the common law doctrines of riparian ownership.

The practical and contemporaneous construction of the statute was otherwise.

Prior to and at the time of the formation of the State government, and at the time of the passage of the Act of April 13th, 1850, the waters of the State to a very large extent were being used in a manner which were in direct violation of the rights of riparian ownership as those rights are asserted here. Before the formation of the State Government—at the time of the adoption of the State Constitution—when the Act of April 13th, 1850, was passed—and continuously down to the present hour, the flowing waters of streams have been not only diverted from their beds but carried in ditches, flumes and canals, miles away from their original course—consumed on the way, polluted by the purposes to which they have been applied, and finally what was left of them emptied into other and different water-courses from that from it was originally taken and diverted, and this mode and manner of the use of waters has been held by this Court to be legal and authorized by law!

Could there by possibility be a use of waters more directly in conflict with the rights of riparian ownership as known to the common law of England?

It is no answer to this proposition to say that the Government of the United States was the riparian proprietor, and made no objection but consented to this use of the water. The United States was not *the only riparian owner*, and it was many years after these diversions had ripened into

an established custom of the country that the United States recognized the legality of the custom.

Nine-tenths of the water that was so used in the State was taken from streams which were tributary to the Sacramento and Feather rivers, and *and upon each of these rivers there were riparian owners who derived their titles from the former governments of the country,* and every drop of water which was so taken from not only these streams themselves but from their tributaries was riparian water, as to these riparian owners, if the common law of England was the law of the land.

It can't be pretended that these individual riparian owners consented to the use of the waters in the manner in which it was used. Upon the contrary, it is a part of the public history of the State that the *pollution* of the water by the manner of its use, a pollution forbidden by the common law brought utter destruction and ruin upon many of these same riparian owners.

The same history tells us that these same riparian owners litigated for years with the parties who were thus using those waters, in order that their lands might be preserved from absolute destruction by the matter with which the waters were polluted and adulterated.

And this use of the waters of the State, which was so utterly subversive of all ideas of English common law riparian rights, was not only an established and existing custom of the country, at the time of the passage of the act adopting the common law as a rule of decision, but it was

almost immediately thereafter recognized and legalized by statute. On the 29th of April, 1851, the Legislature passed "An Act to regulate proceedings in civil cases in the Courts of Justice in this State."

Sec. 621 of this enactment provided:

"That in actions respecting mining claims proof shall be admitted of the *customs, usages*, or regulations established and in force at the *bar* or diggings embracing such claim; and such *customs, usages*, or regulations, when not in conflict with the Constitution and laws of this State shall govern the decision of the action."

And this has continued to be the law of this State ever since. (Sec. 748 of the Code of Civil Procedure.)

The importance of this statute in the consideration of the question now before the Court will be apparent if we will but call to mind the historical fact, that at the time of its enactment the mining industry of the State was almost exclusively limited to placer mining—a character of mining at that early period almost confined to the *bars* in and the *beds* of the streams. This industry could not have been prosecuted if the English law of riparian rights, as here contended for, had been the law of the land. The business necessarily demanded not only the removal of the waters from the *bars* and *beds* of streams to be mined, but an adulteration of the waters in a manner utterly at variance with the common law notions of the rights of a riparian owner.

At this early period of the history of the State

this business of placer mining was supposed to represent the entire value of the State. The representatives of people engaged in this business composed the largely controlling majority of the Legislature that passed the Act adopting the common law *as a rule of decision.*

I insist that these representatives did not intend, by making that adoption, to adopt any rule of the common law which *might* be used for the destruction of the only business upon which their constituents depended for their prosperity.

At this time there was a bank or riparian owner of every stream in the State. I think a reference to that map of the State upon which is designated the locality of grants of lands made by the former governments of the country will show that there was one or more of those grants bordering upon every stream, upon the head waters or tributaries of which placer mining was being conducted in 1849–50 and '51. As to *all* the lands not thus in private ownership, the title was in the United States.

So that if English law of riparian rights became the law of this State by the Act of April 13th, 1850, it was in the power of any *one* of these individual grant owners, or of the United States as a private proprietor to have destroyed the then paramount industry of the State. I beg in this connection to remark that if the common law *upon this subject* was adopted *at all* it was adopted in its whole length and breadth. There is no exception to be found in the statute as to its application. No modification or change in the com-

mon law rule is hinted at. These exceptions, modifications and changes which must be incorporated into the common law rules, in order that the industry of placer mining, as conducted in early years, might be preserved, are subject matters of legislation, and cannot be made by the Courts; if the common law upon the subject was adopted at all, it was adopted as a whole.

For these reasons I respectfully submit that it cannot be reasonably held that the Legislature of 1850, by the passage of the Act of April 13th of that year, adopting the common law as a rule of decision, *intended* thereby to adopt the common law rules of riparian rights.

3rd.

Other early and nearly contemporaneous legislation of this State negatives the idea that the Legislature *intended* by the Act of April 13th, 1850, to adopt as the law of this State the English common law rule of riparian rights.

And the particular piece of legislation to which I will refer the Court in this connection has special reference to the waters of the streams which are involved in this litigation.

Kern county, the *locus* of the lands and waters in controversy in this action, was formed out of parts of the territory of the counties of Tulare and Los Angeles.

Statutes of 1865-6, page 796.

On the 15th day of May, 1854, the Legislature of this State passed an Act for the creation of a Board of Water Commissioners in several counties of this State, *including the counties of Tulare and Los Angeles.* (Statutes of 1854, page 76.)

This Act, as subsequently amended from time to time, is found in Vol. 2 of Hittell's General Laws at paragraph 7278, *et. seq.*

The third section of this Act makes it the duty of the Commissioners "to examine and direct such water-courses as they adjudge ought to be appropriated to public use and apportion the water thereof among the *inhabitants of their district*, determine the time of using the same and, upon a petition of a majority of the persons liable to work upon ditches, lay out and construct ditches as set forth in such petition."

Read this section and it is utterly inconsistent with the idea of the existence in this State at that time of the English common law of riparian rights as here asserted. It contains an unmistakable recognition of the *public nature* of the *use* of water for irrigation purposes. It contemplates the *diversion* of water from its natural channel. It provides for a *general* apportionment of the use of water among *all* the inhabitants to whom its use would be valuable, regardless of the situation of the land upon which it was to be used.

So important was the public *use* of waters that by Sec. 10 the Statute gave the Commissioners the right of way for ditches for the diversion of the water, and by Sec. 11 it made it

a penal offense to obstruct the waters of any ditch.

There could be no plainer or more unmistakable declaration of a public policy as to the waters of the State than such as is manifested by this Act and that public policy is in all its parts totally at variance with the existence of any such thing as the common law doctrine of riparian rights. It is true that it applied to but a few of the counties of the State, but the exercise of the power in these counties was the assertion of the power to legislate in the same manner as to the whole State.

And this conclusion is fortified and strengthened by the provision which the same statute makes by Sec. 14, for compensation to be made to such persons as may be injured by the diversion of water allowed and directed to be made.

By Sec. 14 it is provided that no one shall divert the waters of any river, etc., from its natural channel, "to the *detriment* of any person or persons below them on such stream unless previous compensation be ascertained and paid therefor under the provisions of this Act or under the provisions of other laws of this State authorizing the taking of private property for public use."

The "detriment" of which the statute here treats is transparently that loss and injury which will be suffered by some one else on the stream *in his use of the water at the time of the diversion* which causes the loss or injury. It is a direct recognition of the existence of the law of prior appropriation.

Under the doctrines of the common law of riparian rights, the diversion of the waters of a stseam is of itself a *legal* damage. The very opposite doctrine is announced in this Sec. 14, viz: That every person may, for a useful purpose, divert the waters of a stream from its natural channel unless, in *the act* of diverting it, he inflicts a detriment or loss upon some other party's *use of the water* lower down the stream.

In the very nature of things it is this impairment of the *use* of water by one lower down the stream which this section was designed to protect. To hold that this means that the common law rights of all persons owning the *banks* of the stream from the point where the diversion is to be made to its mouth is to be condemned and paid for as private property taken for public use is to give the statute a construction which would render it entirely inoperative, and this is forbidden by all rules of construction.

If the bare, naked right of the common-law riparian owner to have the undiminished and unadulterated flow of the stream continually is the thing which this statute contemplated should be previously compensated for, then the statute was necessarily a nullity, the labor *only* of the ascertainment of who were the riparian proprietors of streams would render it entirely inoperative, and at the time this Act was passed the United States was the riparian owner of the larger quantities of the lands through which the waters flowed. Did the statute mean that the United States should be made parties to such a proceeding, and that it

should be compensated for the uncertain, unascertainable, prospective and imaginary injury which *its* lands would suffer by every diversion of the waters of the stream? If this was its meaning, where is the process which is to bring the United States into Court, and where is the Court that would have jurisdiction over that government?

Did it mean that the Commissioners, before commencing to dig a ditch, should ascertain *every* man owning land on the stream below the proposed point of diversion, negotiate with him for his consent, and, in case of failure to obtain his consent, institute against him measures of condemnation?

The answers to there queries are self-evident. Any such construction would render the statute ridiculous in the extreme. The very impossibility of any estimate being rationally made of the detriment caused by the diversion of water except in so far as that diversion will necessarily effect a pre-existing *use* of the water, impels to the conclusion at which I have arrived. The statute is treating of the *use* of water, and when it makes provisions for compensation for *detriment*, it must of necessity mean *detriment* to the *use* of water.

This Sec. 14 was not intended to operate as a limitation upon the powers of or apply to the Commissioners named in the Act. This is manifest, from the entire absence in the statute, of all provisions by which the amount of compensation to be made is to be ascertained, as well as by the fact that if *they* were to make compensation to all

bank owners upon the stream before they could divert any of the waters of the stream, the necessarily small area upon which they could have been authorized to levy an assessment for that purpose would be utterly inadequate to raise the money necessary.

In addition, while the statute carefully prescribes the manner in which they can condemn a right of way for ditches or canals, and in which to raise funds to compensate therefor (Sec. 15), it gives them *no* power or authority of any kind to exercise the right of eminent domain as to the *waters* of the stream, nor does it give them any means whatever of raising money with which to make the compensation *for the taking of water.*

If I am right in this construction, and I think that it is not susceptible of a different construction, then this Section 14 is a strong authority in support of the position that at that early day it was the sense of the legislative department of the government that the Act adopting the common law was not intended to vest the bank owners of streams with the English common law rights of riparian ownership, or to divest the State of its legislative power over the use of the waters of the streams of the State.

That I have correctly interpreted this Section 14 I think will be apparent from other legislation in *pari materia* with this Act of the 15th of May, 1854.

On the 4th of April, 1864, the Legislature passed "An Act to create a Board of Water Commissioners in Tulare county, and to define

their powers and duties." (Statutes of 1863–4, page 375.) And when this Act was passed a portion of Kern county was embraced within the limits of Tulare county.

The first section names the Commissioners, and provides for the election of their successors.

Section 2 prescribes their duties and powers. Among these duties and powers are: To lay out and cause to be constructed such ditch or ditches in any district or *neighborhood* as "may be necessary to irrigate the land in cultivation" therein; to apportion the water to each individual in proportion to the land cultivated by each, and to reapportion the same whenever necessary.

These provisions cannot be made to harmonize with the idea that its enacting authority supposed that the English common law of riparian rights was the law of this State. The lands which were to be irrigated under its provisions were such as were situated in the "district or neighborhood," and not such only as were situated upon the banks of the streams from which the water was to be taken. The use of the water was to be apportioned "in proportion to the land cultivated by each individual," regardless of the situation of the land with reference to the banks of the stream.

The third subdivision of this section then enacts: "No ditch shall *hereafter* be taken out of any stream *in the waters of which* different persons *have an interest* without leave of said Commissioners."

Who are the parties that can "have an interest" in the waters of a stream within the meaning of this enactment? Manifestly *every individual whose lands can be irrigated by the waters of the stream*, or who have appropriated the same when the same has been diverted.

Read the section as an entirety, and no other construction is possible.

Here we find as explicit recognition to the use of flowing waters as could well be made. No legislative enactment could be more directly antagonistic to the doctrine of the ownership of such waters by the proprietors of the banks of the stream. It forbids—prohibits—the bank proprietors to take out the waters of the stream *without the consent of the Commissioners*, and why? Manifestly, in order that the bank proprietors may not thereby impair the use of waters by the neighborhoods—on or off of the stream—who were allowed by the Act to irrigate their lands from the stream.

The tenth section of this act contains the same saving clause as the Act of May 15th, 1854, namely, "No person or persons shall divert the waters of any river or stream from its natural channel to the *detriment* of any person or persons located below them on the same stream."

Here this provision is evidently intended for the protection of those persons who had *theretofore* taken out the waters of a stream. In other words, it is the converse of the prohibition made by subdivision 3 of Sec. 2.

This construction is indispensable to effectuate

the evident purposes of the enactment. Any other construction would destroy and render ineffective those purposes.

The eighth section of this Act of 1864, provides that "The Commissioner shall have the right of way to lay out and construct ditches *through any lands in the county*," and provides the machinery for condemning such right of way.

The ditches which they make may extend to and run through *any lands in the county*, What are these ditches for? To distribute the waters of the streams? Could there, by possibility, be a more emphatic repudiation of the existence of a bank proprietorship of those waters? All the lands in a county cannot be bank lands. But the statute in terms gives all the lands in the county that can be reached by a ditch the right to the use of the waters of a stream. Take this provision of the statute in connection with the power which it confers to exercise the right of eminent domain, to acquire the right of way for ditches, and I submit *that this enactment is a plain and unambiguous expression of the existence of a public policy of this State that all the flowing waters of the State are the common property of the people of the State, subject in its use to the control and regulation of the legislative power of the State.*

The statute contains no provision for the condemnation of the right to divert the waters. The very absence of this provision taken in connection with the right which is given of condemning the right of way, is the equivalent of the positive assertion of the right of the *State* to permit and

allow of the diversion of the water without let or hindrance from any source.

The provision in favor of persons located lower down on the stream was a mere gratiutous preference for such person, and, so far from being inconsistent with the absolute right of the State to regulate the use of the water, for which, I contend, rather agues an opinion of the Legislature, that the saving provision was necessary to protect such person in their use of the water which they might have already have appropriated.

It is true that the statutes to which I have referred are local enactments, but for that reason they are no less valuable as indicating the legislative opinion as to the right of the State to control for the general public good, the flowing waters of the State. The public policy may be declared or evidenced by a local, as well as by a general statute. If by the adoption of the common law as a rule of decision, the State parted with its right of legislative control over the waters of the State, and vested those waters in private ownership, the Legislature thereafter had no more right to legislate in relation thereto by local enactments than they would by general statutes. This local legislation, to which I have referred, evidences that the Legislatures of this State in 1854, and in 1864, did *not* construe the Act adopting the common law, as it is sought to have it construed in this case.

I could refer to many other enactments of a local character, which would show this same re-

sult, but I will now pass to the consideration of certain general statutes upon the same subject.

4th.

The first of these general statutes to which I will direct the attention of the Court, are those provisions of the Civil Code of this State, found in Sections 1410 to 1422 inclusive.

It is under this general law that the defendants in the case at bar claim the right to the use of the water which is in controversy here.

Section 1410 provides that—

"The right to the use of running water in a river or stream, or down a cañon, or a ravine may be acquired by appropriation."

Sec. 1411 provides that the appropriation must be for some useful purpose, and when it ceases to be used for such purpose the right ceases.

Sec. 1414 provides that—

"As between appropriators, the one first in time is the first in right."

The statute then proceeds to give the mode and manner in which an appropriation may be made and evidenced, and concludes with Sec. 1422, which provides that—

"The rights of riparian proprietors are not affected by the provisions of this title."

It is the presence of this last section which it is supposed creates all the trouble in this case.

The statute undoubtedly starts out with the assertion of the right of the State to legislate as to the *use* of the waters of the streams of the State. It does so legislate, and in its legislative discretion it provides that the use of those waters may be obtained and acquired for any useful purpose by appropriation, and that the first appropriator in time is the first in right.

Now this assertion of the right to legislate upon this subject and this legislation itself is utterly opposed to the existence of any idea upon the part of the Legislature that the English common law of riparian ownership, as here asserted, was the law of this State. If the common law doctrine was then the law of California, the State could *not*, as that law is generally understood and insisted upon here, legislate upon this subject, and it especially could not have permitted the right to use the water to be acquired by appropriation. It being the object and purpose of this statute to give the State's consent and permission to the appropriation of water, it certainly could not have been intended by Sec. 1422 to *give* or *confer* the rights of riparian ownership; neither could it have been the *intent* of the Legislature by the enactment of Sec. 1422 to recognize thereby that the English common law of riparian ownership was *then* the law of this State.

Here the Legislature asserts its right to legislate upon this subject, and does legislate, and its legislation is altogether and entirely as a whole, and in all its parts opposed to the existence of the English common law upon the same subject,

and this Court cannot attribute to it the folly after doing this of saying by Sec. 1422, "That all of these provisions which we have enacted upon this subject are a nullity, inasmuch as we have no power to so legislate upon the subject-matter."

Some other construction of Sec. 1422 *must* be found. No construction can legally be impressed upon any statute which will destroy its effectiveness or render it absurd as long as any other construction is *possible.* Now, is this Sec. 1422 susceptible of any other construction than that of conceding that the English common law doctrines of riparian ownership as to flowing waters were then the law of this State?

I submit that it *is* susceptible of several other constructions, which will make it harmonize with and not destroy the enactment.

(a.) There are several rights of riparian ownership which are distinct from and independent of the uses of the flowing waters of a stream, and *all* of which are substantially identical under the common law and the civil law which prevailed in California under the former governments. Of these there occur to me the following:

The right of the riparian owners to the bed of a stream, to its *thread;* the riparian owner's right to the gradual accretions made to his land by the stream; the riparian owner's right to islands formed in the stream; the riparian ownership of the banks of the stream. These rights of riparian ownership were substantially the same under the Spanish and Mexican law as under the English law.

It may well be that the Legislature, by the enactment of Section 1422, had in mind these rights of riparian ownership, and intended to preserve them from being affected by the right which it gave by the other parts of the enactment to appropriate the water. At all events, these are subjects of riparian ownership, the preservation of which would *not* conflict with the other parts of the enactment.

(b.) Again, this statute not only speaks of prospective appropriations of water, but by Section 1420 it expressly recognizes the legality of *former* appropriations made, it may be, under some of the many special and local laws which had been passed upon the subject or under the prevailing customs of the country. In the ordinary acceptation of the terms, all of these appropriators were "riparian proprietors." They had acquired a right to take the waters from the streams which could only be done at its banks; they were, in a certain sense, riparian proprietors, and it may well be that this Section 1422 was designed for the better, securing the rights of this class of citizens. Such a construction certainly would not be a strained one. It would harmonize and preserve the effectiveness of the statute, and not destroy it or render it ridiculous. But it may be said that here the Legislature has used a technical term or phrase which is inconsistent with this construction. Technical terms are not *always* used by a Legislature in a technical sense. The rule requiring technical phrases to be construed techni-

cally, is one in aid of the ascertainment of the legislative intent. When other parts of the statute show that a technical meaning cannot be given to technical phrases without defeating the *manifest* legislative intent, then the rule ceases to be a rule of construction, and that is just the case here, for it was the manifest *intent* of the Legislature to allow the use of the water to be acquired by appropriation. This manifest intent is inconsistent with the use in Sec. 1422 of the phrase "riparian proprietors," in a technical sense of asserting that riparian owners are invested with such rights as would enable them to defeat the appropriation of water, which it was the *sole* purpose of the statute to authorize and expressly legalize. Reason and principle demand that the Court shall find some other construction of this phrase "riparian proprietors" than its strict technical meaning.

(c.) This Sec. 1422 is susceptible of this construction, viz.: The Legislature may have intended by it to preserve and protect *possible* rights which it did not believe to exist, but which the Courts might say did exist.

It evidences its belief, and expresses its *opinion* that the rights of riparian proprietorship, whatever they might be, did not prevent the State from legislating upon the subject, and permitting the right to the use of water to be acquired by appropriation. By this Sec. 1422 it may be held that it intended to say that, notwithstanding this legislation, no water can be appropriated to the detriment of any one who may be vested with such

rights therein as would prevent legislation which would destroy or impair them, and this is the most favorable view which can be taken of this section for the appellants in this case. If this view be adopted, then it simply means that the Legislature refers the question of the existence of *such* riparian rights to the Court to be determined by *pre-existing laws*—such determination to be made without other reference to this enactment than the Court can properly give to the *opinion* of the Legislature which enacted it, *that no such rights exist.* This Sec. 1422 cannot be construed as conferring any rights of riparian proprietorship —it cannot be construed as recognizing the existence of any such rights as would prevent the operation of the statute. The best that can be said of it for the appellants is, that their rights are to be determined as if this section had never been enacted.

And I submit that, in the consideration of this qnestion, the defendant has the right to ask the Court to give great weight to the legislative expression of opinion contained in this enactment and the special and local laws to which I have referred, to the effect that the Legislature had and possessed the constitutional power to make and pass them. These enactments present a case of contemporaneous and continuous legislative construction, that the doctrines of the English common law of riparian ownership, as claimed here, were *never* a part of the law of this State. I submit that this construction should be controlling in any case when the existence of the common law

rule is derived solely by an *inferential* construction of a three-line enactment, the necessary purpose of which was *not* to adopt this common law doctrine.

If the Legislature had passed an act which in terms adopted as the law of this State, respecting its waters, that part of the common law of England known as the doctrine of riparian rights, I admit that there would be but slight grounds to appeal to legislative construction. But when the fact, whether it has or has not adopted that doctrine of the common law is one *purely* of construction, then the legislative opinion as to whether it had or had not so *intended*, as derived from its repeated legislative acts upon the subject, I submit should be, if not a controlling, at least a weighty consideration with the Court in determining the question.

5th.

But there is still another reason why the Act of April 13th, 1850, adopting the common law as a *rule of decision* cannot be construed as having *created* those *vested rights* which are here asserted as the rights of an English common law riparian proprietor.

I think I have already said enough to demonstrate that those *relations* between land and water which are comprehended in the expression of the common law rights of English riparian proprietor are not *natural* relations, but relations created by *operation* of law.

The laws which in England operated to create those relations were undoubtedly the *common law.* If those relations were ever created in California, they were necessarily created by *statute;* and the statute which thus created them must inevitably have been the result of an exercise of the legislative power upon this subject. Was that *one* exercise of the legislative power upon this subject *a final and exhaustive* exercise of the power?

It must be admitted that if the common law doctrine of riparian rights, as known to the law of England, was adopted by the Act of April 13, 1850, that the subsequent legislative Acts, to which I have directed attention, authorizing the appropriation and diversion of water, was in *direct conflict* with the Act of 1850. Being so in *conflict* with the Act of 1850, this subsequent legislation *necessarily* repealed the legislation of 1850 upon the same subject, *if* the Legislature had the *power* to repeal it.

The assertion in this case of the continued existence of the common law doctrine of riparian rights, and the deraigning of those rights under the Act of April 13, 1850, *notwithstanding this subsequent legislation, is* the assertion of the proposition that the legislation of 1850 upon this subject *was an exhaustive exercise of the legislative authority upon this subject matter, and was irrepealable.*

I concur in the suggestion made upon the oral argument by Mr. Justice Thornton, that this proposition is so palpably unfounded that it *ought* not to be made the subject matter of argument. If

the proposition had *only* been asserted directly, or by necessary inference by counsel for plaintiffs, I might have felt at liberty to have passed it by in silence, and to have relied upon what appeared to me to be its transparent unsoundness as an all sufficient answer to it.

But when a majority of the Court, after the former hearing, had apparently overlooked the effect of this subsequent legislation, as a repeal of the legislation of 1850 in this regard, and had designated and treated the riparian rights derived from and under that Act of 1850 (notwithstanding this subsequent legislation) as "*vested rights*," I respectfully submit that I was driven, out of respect for the Court, if for no other reason, to discuss the proposition.

I admit that a single exercise of legislative power *may*, in certain and *exceptional* cases, be, *as* to a certain subject matter, an exhaustive exercise of that power.

The exceptional, and the *only* exceptional, case in which the exercise of legislative power is exhaustive and prohibitory of other and further and different Acts of legislation, is where an Act of legislation comprehends and constitutes a *contract* between the *public*, represented by its legislative power, and some other person.

The principles are too firmly settled in the jurisprudence of this country that the legislative power is inalienable—that one Legislature cannot so enact as to prohibit its successors from legislating as their judgment may dictate upon the same subject, except in the single case of a legis-

lative contract, to require the citation of any authorities in their support.

Did this enactment of April 13, 1850, possess *any* single element of a contract between the public and the bank owners of the streams of the State which would prohibit future legislation upon the same subject?

What *consideration* moved from the bank owners of the streams of the State to the State for this supposed relinquishment by the State of its sovereign power of legislation? Was there any? Does this Act of April 13, 1850, contain any invitation by the State to the owners of the banks of its rivers to do anything which they, having done, renders it inequitable on the part of the State to legislate again and differently upon the same subject matter?

Can the most microscopic examination of this three-line enactment, discover in it a single word which can be construed as *granting* anything to anybody, or as holding out *any* promise to *any* one, that the rules of the common law, which it purports to adopt, were to be unchangeable and unrepealable?

The Supreme Court of the United States in *New Jersey* vs. *Yard*, 95 U. S., 114, in discussing the question of legislative contract, says:

"The difficulty in this class of cases has always been to distinguish what *is intended by the Legislature to be an exercise of its ordinary function in making laws, which like other laws, are subject to its full control by future amendments and repeals,*

from what is intended to become a contract between the State and other parties, when the terms of the statute have been accepted, and acted upon by those parties."

And on page 116, the Court says:

"We admit the force of the doctrine that when it is asserted that a State has bargained away her right of taxation in a given case, *the contract must be clear, and cannot be made by dubious implications.*"

I submit that it is clear upon the face of the Act of April 13, 1850, adopting the common law as a rule of decision, that it was "*intended by the Legislature to be an exercise of its ordinary function in making laws, which like other laws, are subject to its full control by future Legislation.*"

I go farther, and I claim that this idea *is actually expressed* in the statute. It adopts the common law as a rule of decision, *only* so far as it is not repugnant to, or inconsistent with the laws of the State of California. Surely it cannot be contended that it was the intention of the Legislature to adopt the common law as a rule of decision *for all time*, in all cases in which it was not repugnant or inconsistent with the *then* existing laws of the State. This *express reservation* was the assertion of a right to change the rule of decision thereby adopted at *any time* in the *future*, by the adoption of other laws which would be repugnant to, or inconsistent with the rules *then* adopted.

And I think I may safely say, that no session of the Legislature of the State for thirty years, ever passed that the "rule of decision" adopted by the Act of April 13, 1850, was not in some measure, and to some degree, made repugnant to, and inconsistent with other laws then enacted by the Legislature.

If the Legislature could alter or change any of these rules of decision which it adopted by the Act of April 13th, 1850, the very same legislative power which authorized them to do that necessarily authorized them to change *all* of them. If there was no element of a contract as to one of the "rules" so adopted, there could be no such element as to *any* of them.

It logically and legally results from these considerations, that no rights could have *vested* in the bank owners of the streams of this State by the adoption of the Act of April 13th, 1850.

This Act of 1850 is not the only statute of this State adopting rules of decision for the Courts of the State, and an examination of another statute of the same character may well illustrate the proper construction of the Act of 1850.

In 1851 the Legislature passed an enactment requiring that Courts in actions respecting mining claims should receive proof of the customs, etc., of miners of the locality, and that these customs, etc., should "govern the decision of the action." (Sec. 621 of Old Practice Act.)

This statute is in *pari materia* with the Act of April 13th, 1850, adopting other rules of decision for the Courts. Both had the same purpose in

view, and both expressed this purpose in unmistakable terms.

Was it ever conceived that this Act of 1851 *vested* any rights of any kind or character in *any* one, or that the Act of April 13th, 1850, vested any rights which prevented the operation of this Act of 1851?

Was it ever supposed that by its adoption the State so far parted with and surrendered its sovereign power of legislation that it could not subsequently amend or repeal, or otherwise legislate upon the same subject? No such ideas ever entered into the brain of any man.

Any such claim would be preposterous in the extreme.

Here are two statutes *both* intended to adopt rules of decision for the *Courts only*. It must be admitted that one of them neither vested any rights in any citizen, nor divested the State of any of its legislative power, and is there any reason why the other should receive a different construction?

I submit that it cannot be successfully, or even plausibly, contended, that the subsequent legislation to which I have directed the attention of the Court, and particularly the enactment of Sec. 1410, *et seq.*, of the Civil Code, did not *necessarily* repeal any part of the enactment of April 13, 1850, which can be construed as adopting the English common law of riparian rights as the law of this State. The only *possible* basis then for the existence of that common law doctrine as a part of the law of this State consists in the proposition

that the Act of 1850 "*vested*" rights which the State could not effect by this subsequent legislation. I think that I have shown that that Act did not and could not have been intended to have "*vested*" any rights of any kind or character whatever.

6th.

Still another reason occurs to me which I think forbids that this Court should construe the Act of April 13, 1850, as having vested in the bank owners of the streams of the State those *rights* which are here asserted to be the rights of the English common law riparian proprietor.

If the authorities which I have already cited as to the laws upon this subject-matter which were in force in California at the time of the formation of the State Government establish no other proposition, I submit *that they do show at the very least that the use of flowing waters of the territory were not private property, but were the subject-matter of governmental control.*

To this governmental control the State of California succeeded.

The very immensity of the interests involved in the subject matter which the State had this right to control, seems to me to impose an insurmountable obstacle to the conclusion that any legislature of the State would have abdicated so important a governmental function.

But, however this may be, we find that at the time of the adoption of the Constitution of this

State the State was entitled to exercise the same right of legislative control over the flowing waters of the streams of the State that existed in the sovereigns of its former governments.

The Constitution of 1849, by Sec. 1 of Art. 4, vested this and all legislative power in the "Legislature of the State."

In the very nature of things no one *session* of that *Legislature* could *divest* itself, or any succeeding session thereof, of one single iota of the *powers* of legislation which existed at the time of the formation of the State Government, and which by its constitution was *vested* in the Legislature as a continuing and ever-unending body.

This doctrine is, or has become, axiomatic. It is a rule which admits of but one single exception, and that the one produced by the principle expressed in the provision of the Constitution of the United States, forbidding the violation of a contract.

If the Act of April 13th, 1850, adopting the common law, can be construed as vesting the bank owners of the streams of the State with the commonly accepted *rights* of the English common law riparian owner, then it *inevitably* involves *a surrender by the State of the then and theretofore existing legislative power over the uses of the public waters of the State;* and this was beyond the power of the Legislature. That power cannot be *vested* in a Legislature which the Legislature *can* surrender.

If the State owns a tract of land in absolute ownership, and not affected by any trust for the

common use, it may sell or grant the same as an individual owner could do, and its conveyance or grant may carry with it all those incidents and appurtenances which would attend and accompany the grant of an individual.

But the tract of land so conveyed by the State would still remain subject to all those legislative powers of the State which the State *theretofore* possessed over similar property in private ownership, and these legislative powers are *vested* in the Legislature, and cannot be abdicated or relinquished by *any* session of that Legislature.

So the State may, like any individual, own property which has been dedicated to a public use, or which is *affected* by a public use, and the State may convey that property, but its conveyance thereof, like a grant of similarly situated property by an individual, will leave the property subject to all those powers of legislative control arising out of the public use with which it was affected prior to the State's conveyance, and this for the manifest reason that the very public nature of the uses with which the property is affected creates a power of *legislation* thereover which is inalienable.

An Instance.—The State owns a tract of land across which a public right of way has been dedicated. The State conveys it, but its legislative power over the uses of the highway are not extinguished, but continue as if no conveyance had been made by the State.

If it be true, as I think it must be, that the State, being the absolute owner of property, cannot, by its conveyance of that property, divest the

legislative power of control of the public uses with which it is affected or to which it has been dedicated, with how much more force does the same principle apply to a naked abandonment or relinquishment of an existing legislative power unaccompanied by any right to grant or any attempt to grant?

If there was under the former governments of California any *public* property in the flowing waters of the territory, that public property under the treaty passed *not to the State of California, but to the United States.*

This conclusion is inevitable.

There can be no pretense that the United States has granted to this State any right of property in the flowing waters of the State. Is not the conclusion irresistible that the State possessed no *property* interests in those flowing waters which it could *grant* to the bank owners of the streams?

If the State could make no such grant, how is the Act of April 13th, 1850, adopting the common law *as a rule of decision* to be construed as *vesting* what are here claimed as the rights of an English riparian owner?

Do not these considerations lead irresistibly to the conclusion that the Act of April 13th, 1850, was simply and solely an exercise of that *ordinary power of legislation which cannot work the vesting of any rights against the State*, and which leaves the *whole* subject-matter of that legislation still in the indisputable possession of the legislative power of the State?

If the State has not obtained any *property* in the corpus of the flowing waters of this State from the United States, and only from the United States could it obtain such *property*, as that government is the only *entity* that could have acquired any public *property* of the former governments, is it not clear that the *only* connection which the State could *possibly* have with those flowing waters, *is the one of legislative power thereover?*

If there can be an answer to this proposition, I have been unable to perceive it.

I have said before, but desire to repeat here, that the plaintiffs are here alleging a *property right* in the waters of Kern river, as an *incident* to their ownership of certain land.

It is claimed that this *incident* was attached to the land by virtue of the Act of April 13, 1850, or that it is one *naturally* attached to the land.

This claim of *natural* attachment, I think I have disposed of. Now, at the time of the passage of the Act of April 13, 1850, the United States was the absolute owner of *all* the land in this State, which had not passed into private ownership under the former governments of the country. At this time the State did not own a square foot of land within its borders. Where, then, did the State obtain *this property*, which it is here claimed that it *attached* as an *incident* to land bordering on streams, by the Act of April 13, 1850?

If this *incident* was *property after* the passage of the Act of April 13, 1850, it must of necessity

have been property *before* the passage of that Act. In whom, then, was it vested?

In the United States, unquestionably. But how did the U. S. own this *property*—this *incident* as an appurtenance of its *bank* lands, or of *all* of its lands?

If it owned it as appurtenant to its *bank* lands' where is *the law*, which so confined its ownership? If it *so* owned it, there *must* be some *law* which so limited it. It was certainly *not* so limited by the laws of the government from which it obtained the property.

If the U. S. owned this *property*—this *incident* —as appurtenant to *all* of its lands within the State, from whence proceeds the power of the State to seggregate it, and to say that it shall no longer be appurtenant to one part of the land, but shall be exclusively attached to the bank lands? Would not such action upon the part of the State have *taken something* from those lands of the U. S. which were not bank lands? And could the State have done this, without *impairing* the title of the U. S. to such of its lands as were not *bank* lands?

Do not these suggestions and thoughts indicate the entrance upon the broad sea of uncertainty, if, in the solution of this question, we depart from those fundamental principles, which can alone furnish a sure guide for its determination, and have resort to an *ordinary* exercise of legislative power, as the basis of a right of property as against the State itself?

I reiterate as logically established propositions:

1st.

That the State *possessed* no *property* rights in the flowing waters of the State which it could grant; and,

2nd.

That the only connection between the State and those waters consisted in the State's power of *legislative control* over the manner in which the same should be *used.*

And as a conclusion from these propositions, I assert, with perfect confidence, that there is no authority—legislative or otherwise—in this State to *alienate* or *abandon* by grant or irrepealable statute or otherwise, this *legislative power* over the manner in which these waters can be used.

This power of *alienation,* or *abrogation,* was forbidden by the express provision of Sec. 1 of Art. 4 of the Constitution of 1849, *vesting* the legislative power of the State in that continuous and unending body known as "the Legislature of the State of California."

Not only is this power of alienation or abandonment forbidden by this express constitutional provision, but it is forbidden by principles of law so inwrought in our systems of government that these principles would work the prohibition if the Constitution was silent upon the subject.

That the legislative power extends to the regulation and control of not only public property, but of *private* property which has in any manner been temporarily or permanently dedicated to, or af-

fected with, a public use, is now the unalterable law of this land.

To say that this legislative power—this continuing and inalienable power—extends to a wharf, a warehouse, or a line of stages, because the individuals who own such property have affected it with a public use, and to deny the existence of the same power as applicable to a subject matter, created by God Almighty for the common use of men—a common use freely recognized by the former sovereigns of the country—would be the veriest travesty upon the law.

To say that the State can, by contract, suspend—never alienate—its power to regulate the freights and fares upon a railroad, for the reason that the *public* interests and the *public uses* to which the property is dedicated demand the existence of such a power of control, and to say that the State, *fully possessing* the right to control the uses of the flowing waters of a State in a country where the productiveness of its soil is dependent upon the uses of those waters, can alienate this power of control over those waters, is to state a proposition which carries with it its own refutation.

This legislative power and control over things and property which are affected with a public use, necessarily differs and varies with different countries and at different times and under different circumstances. That *thing* which would be affected with a public use in one country *might* not necessarily be affected by the same public use in another country. That *property* which would be

affected by a public use at one period of time, and under certain existing circumstances, *might* not be affected with the same public use at another time, or under different circumstances and conditions.

And from these considerations it results that every sovereignty *must* possess the power and authority of exercising this *police* power of regulation and control according to its own *discretion*, exercising the power when required, and forbearing its exercise when the public good does not require it. The *principles* of government which created and make necessary to the good of the many the exercise of this power of *control* over subject matters which concern the public welfare, prohibit the governmental alienation of this power of control.

And particularly should these principles forbid the placing of a construction upon any legislative enactment which carries with it a relinquishment of this legislative power of control, when the statute is susceptible of another and a different construction.

But it may be said that these same *principles* should have prevented the common law of England from having the operation of *vesting* in riparian owners those rights of property which are commonly known as riparian rights.

The origin of some of the rules of the common law are so obscure and so ancient that it is now impossible to know what were the circumstances and conditions surrounding their origin or what were the general and controlling principles of

jurisprudence existing at the time when they first originated. And such is the case with this rule of riparian rights. There *must* have been a period when this common law rule of riparian rights had its inception in England. This inception necessarily grew out of the existence of a public policy which permitted such rights to attach to the bank owners of streams, for, as I understand it, the common law is nothing but the expression of public policy.

Whether at the time of the inception of these English riparian rights there supervened some other law which operated to make the public policy to which they owed their existence, unchangeable, I do not know. It is barely possible that there may have been something in the *nature* of the feudal system which operated to prevent any incident which may have been annexed to land from being thereafter separated therefrom.

But is it at all certain that the common law of England has created any rights in riparian owners would prevent the legislative authority of that country from changing the public policy which created such rights as do exist?

As a general—if not a universal—rule, all public policies are necessarily changeable.

We do know that the English governmennt has never attempted to change the common law of riparian rights, but the fact that they have not made the *attempt* is no evidence of the want of power.

A legislative power can *never* be lost by non-user.

The fact that when a riparian owner, for the

public good, is deprived of any of those rights which the common law of England permits him to enjoy, the laws of England provide (if they do so provide) that he shall receive compensation therefor, affords no argument in support of the proposition that riparian rights are of that *vested* character which could not be divested by a change of the law which created them.

As long as the law, or the public policy which created them, continues unrepealed or unamended, it would be an act of palpable injustice to take from one riparian owner those things which he enjoys, even by the grace or favor of his government, and which other persons similarly situated are allowed to continue to enjoy. To prevent this injustice, it is right that he should be compensated when he is selected out of all the inhabitants of the country to surrender to public use those things which he has been permitted to enjoy by the public policy of the country.

But there is a still more potent reason why the operation of the common law of England, in creating the *vested* rights of riparian ownership *against the government*, if it ever created such rights, cannot be the measure of the operation of any statute of this State, and this reason is found in the fact that the laws of no country *can dispose of anything which the government of that country does not own*, and the Legislature of California is forbidden by its constitution to alienate or abandon its governmental powers.

I think I have already shown that the waters of the streams of this State could not *possibly* be

owned by the State, and that there has been no attempt even made by the State to abrogate its legislative functions upon the subject. So far from the State having attempted to relinquish its legislative authority over the subject of flowing waters, its legislation to which I have directed the attention of the Court, constitutes a continuous and uninterrupted assertion of its power over the subject matter.

In the presence of this constitutional prohibition against the alienation or abandonment by the State of its sovereign legislative power, it is unnecessary to prosecute the inquiry whether the government of England could alienate *its* legislative power in favor of riparian owners, and thus vest in them the so-called riparian rights. It is sufficient for us that no legislature *of this State* could do so.

In this connection I beg to observe that the common law of England, upon the subject of riparian rights, as upon all other subjects, was the result of growth and development. None of its rules, as they now exist, sprang into existence as full-fledged rules of action.

The familiar history of the progress, growth and development of the English riparian law, shows that it was moulded and shaped with the view of asserting and preserving to the public all those rights connected with the subject matter which might be of interest to the people at large in a country situated as and possessing the peculiar climatic features of England, and only aban-

doning to private control those incidents which *there* could not be of public concern.

This affords an evidence that those riparian laws were but the outgrowth of the public policy of the country, and if that public policy had so required that there would have been no such thing as riparian rights in the sense involved in this case.

When this State adopted the common law as a rule of decision, it certainly adopted its fundamental principle of expansiveness and adaptibility to both existing and future conditions. As public policies change and vary with the requirements and necessities of a people in different sections and at different times, so must the rules of the common law change and vary, or else this principle, which has been well denominated its crowning glory, has become a snare and a delusion.

In this case, and as to this question, I do not ask the Court to set aside, to change or vary any common law rule by virtue of any *change* of public policy *to be adopted by the Court;* but I do ask the Court, if all other arguments fail, to remember and bear in mind, first, the public policy of the former governments of this country upon this subject, as derivable from the laws of these governments which I have cited, and, secondly, the public policy of this State upon the same subject, as derived from its statutes which I have cited, and the well-known customs of its people, and to declare that by virtue of the *continued* existence of this public policy, for more than three

hundred years, the common law rule of riparian rights, as here asserted, *cannot* be the law of this State.

I beg the Court to remember that the common law, upon any subject, is but the expression of the public policy upon that subject, and that none of its rules can exist, as controlling factors, in opposition to the expressed or manifested public policy of the country.

If I have succeeded in showing that the English law of riparian rights either never has been the law of this State or is not *now* the law of California, then the judgment of the Court below, refusing to grant the injunction which plaintiffs sought, *must* be affirmed.

I submit with great confidence that I have made this demonstration. In doing so, I have relied upon and presented to the Court no fine-spun theories, but rules of construction and principles of jurisprudence as long and as thoroughly and as immovably established as are any other rules and principles which govern and control the administration of justice. If these rules and principles are kept in mind in the consideration of the question presented for decision, I have no doubt or fear of the result of the consideration.

7th.

But before leaving this question of the existence, as the law of this State, of the English common law of riparian rights, I desire to present one other aspect of the question with the view of

showing that the *English* common law upon the subject cannot be the law of this State, *inasmuch as the laws of this State not only give no remedy for the doing of those things which would have been an invasion of riparian rights under the English common law, but in terms deny the only effective remedy for the protection of such rights.*

And in connection with this proposition, I will show, from the record in the case at bar, *that the plaintiffs have not presented or made a case which entitles them to any relief under the laws of this State which provide for and give a remedy for the invasion of a right to use the waters of the streams of this State.*

When a right is created by statute, the *remedy* which the statute gives for a violation of the right must necessarily be considered in connection with the statute creating the right. Where the language of the statute creating the right is susceptible of more than one construction, and another statute or another part of the same statute prescribes the remedy for the violation of the right which the statute creates, the statute providing the remedy may point infallibly to the true construction of the one which creates the right. And so it is in this case as to this question.

It is familiar learning that *the* remedy which one riparian owner at common law possessed against another riparian owner who diverted or adulterated the water was an action at law for abatement, with or without damages, or in equity to abate the nuisance, or to enjoin the continuance of the acts which produced the nuisance.

And so the Legislature of this State, when it came to define a "nuisance" by Sec. 3479 of the Civil Code, as originally adopted provided, that anything should be a nuisance which "unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage any lake or navigable river, bay, stream, canal or basin, or any public park, square, street, or highway."

Here the nuisance is made to consist of the unlawful *interference* with the stream which is sufficient to cover the case of an adulteration of its waters and the *obstruction* of the stream which meets the case of its diversion.

And we find that subdivision 3 of Sec. 370 of the Penal Code, as originally adopted, gives the *same* definition of a public indictable nuisance.

If these two enactments had remained as they were thus originally adopted, they would have afforded an argument in support of the proposition that they were intended to give and secure the same remedy for an adulteration or diversion of the waters of a stream as the public and riparian owners possess at common law. But shortly after the adoption of the Codes, a commission was appointed to *revise* them—to make their different provisions harmonious and to reconcile their respective enactments. This commission consisted of Judges Temple and Field, and Mr. John W. Dwinelle.

The amendments to the Codes proposed by this Commission and adopted by the Legislature, indicate from the very purpose of the appointment of the Commission, even more of a *system* of law

than can be attributed to the work of codification itself. The codifying had been done—it was transparently and maybe inherently defective, inasmuch as it lacked that harmony and want of conformity of its different provisions, the one with the other, so indispensable to every code of law.

The work of the Commission, therefore, was to create that harmony, to produce that conformity which the original enactment wanted. The amendments proposed by this commission were adopted by the Legislature of 1873-4, and generally took effect on the 1st of July, 1874. When these Commissioners came to consider the law of the *uses* of the waters of the streams of the State, and the *remedies* which the law prescribed for a violation of such rights as a person might have in a stream, they found a conflict between the right and the remedy. The amendments which they proposed to the law of *remedy*, and which were adopted by the Legislature, indicate with unerring certainty their construction of the laws of *right*—and the Legislature, by the adoption of their amendments, necessarily adopted their construction of this law of *right*.

They amended this law of remedy, so that Sec. 3479 of the Civil Code, and Sec. 370 of the Penal Code, should, so far as this question is concerned, read as follows:

"Anything which * * *unlawfully* obstructs the free passage *or use in the customary manner* of any lake or river, bay, stream, canal or basin, or

any public park, square, street or highway is a nuisance."

This was a very radical change in these two statutes. It incorporated into the definition of a nuisance both public and private, a new and most important element. It made a nuisance as to the waters of a stream such acts only as obstructed the *use* thereof in that manner which was *customary* in this State. And why was this change suggested by the Commission and adopted by the Legislature? Evidently for the reason, that this change was necessary to harmonize this law of the *remedy* with those sections of the Civil Code recognizing, confirming and allowing the *use* of waters to be obtained by appropriation. Examining *all* the Codes with the utmost diligence, I think it will be impossible to find any other portions of those laws which these amendments could even tend to harmonize.

I submit these amendments made in the definition of a nuisance—public and private—give a *legislative* construction of the then existing laws of this State, that none of them had operated to create in this State those rights which are known as the rights of the English common law riparian owner.

If there be any branch or head of equity jurisprudence other than that of *nuisance* to which the English common law riparian proprietor could appeal for relief against a violation of his riparian rights, I confess that I cannot conceive what branch or head it may be. It is not conceivable that the distinguished gentlemen who

recommended these changes in this law of the remedy or the Legislature which adopted them intended to say at one and the same time that the English law of riparian rights is the law of this State, and that such riparian owners should have no effective remedy for the *preservation* of their riparian rights. And this is the inevitable result of this legislation unless a discovery can be made of some ground of equity jurisprudence, which will authorize a court of equity to enjoin as a nuisance that which is not declared by law to be a nuisance.

It is very clear that under Sec. 370 of the Penal Code, as amended in 1874, the obstruction of the waters of a stream which does not affect the passage of waters the stream or the use of its waters in the manner *customary* in this State at the time of the doing of the act complained of, would not constitute a *public* nuisance.

I submit that no act can be a *private* nuisance which would not be a *public* one, if in its effects it acted injuriously to the *many* as well as to the individual. See Secs. 3480 and 3481 of the Civil Code.

Now, do not these enactments in their very terms recognize that in this State there was a *legal* right to the use of streams and their waters *other* and *different* from those which would have existed if the English common law of riparian rights had been the law of the land?

If the English law of riparian rights was the law of this State, why were not these enactments

permitted to remain as they were originally passed?

Not only do these amendments of 1874 of Secs. 3479 of the Civil Code and 370 of the Penal Code recognize an existing right to the use of the waters of the streams of the State antagonistic to the rights of the English common law proprietor, but they go much farther, and assert in language as plain and unsusceptible of misconstruction as could have been used, *that the whole subject matter of the use of those waters was, and should continue to be, subject to legislative control and regulation.*

The provision is that to constitute a nuisance in obstructing a stream it must not only interfere with the use of the stream in the *customary manner, but* that the acts which create the obstruction *must also be unlawful.*

The two things must concur—there must be acts which obstruct the use of the stream in the *customary manner, and* those acts *must be unlawful.*

Could there by possibility be a clearer assertion of the legislative authority to control and regulate the use of all streams and their waters than is afforded by this enactment?

It does not provide that the streams shall always and forever continue to be used according to the customs of the country in which they flow, but it carefully preserves and asserts the power of the State to permit and allow such a use of them as will obstruct their use in the *customary manner.*

I am not arguing that these provisions either

created or were necessary for the preservation of the State's right to absolutely control and regulate the use of its streams and flowing waters. Very far from it. Those are rights which I have contended, and do still contend, are both inherent and inalienable, and it is because I see plainly asserted in these statutes this fundamental principle that I dwell upon them.

The erection of a bridge across a navigable stream may and often does materially interfere with the use of the stream in the *customary manner*, but if this obstruction is authorized to be made by law, it is not and cannot be an *unlawful* obstruction, and consequently it cannot be a nuisance. The erection of a bridge or dam across a stream, the *customary* use of which is to float logs, may not only injuriously affect but absolutely destroy its use in the *customary* manner. But if the erection of the bridge or dam is allowed *by law*, the obstruction of the stream which it may cause is not an *unlawful* obstruction, and under these statutes cannot be a nuisance. These are but familiar *instances* of the application of these statutory provisions requiring that the obstruction to the use of a stream, even in the customary manner, shall be *unlawful* in order that they should be a nuisance.

The same principle is of *universal* application, and is made so by the very *terms* of the statute.

I submit that this expressly asserted power of the State to render and make lawful any obstruction it may please to the use of the streams of the State, supports in its entirety my proposition, that this legislative power of control and regulation

neither has been, nor could be alienated or abandoned by the State.

If the English common law of riparian rights was adopted as the law of California, it was necessarily attached to *every* stream in the State. The Act of April 13th, 1850, is a general statute operating alike in every part of the State. It applies, if it be the law, to those parts of the State where its streams are used for mining purposes in the same manner and to the same extent as in those parts where they are used for agricultural purposes. The statute makes no exception. The Court can incorporate into it no exception.

This common law, if it was adopted at *all*, was adopted in the exercise of the legislative policy of the State. This cannot be denied, and is it not a most weighty argument against the existence of a legislative *intent* to adopt that law, when the subject matter of its application could *not* have been *wisely* controlled by a universal public policy, applicable alike to all the streams of the State? In the very nature of things the uses of water for mining purposes and in mining districts would require other laws for its control and regulation than such as would be necessary to control and regulate its use for agricultural purposes and in farming districts.

It is altogether possible that no two streams in the State could be used to the greatest good of the people for the same purposes, and in the same identical manner, just as the police laws of one aggregation of human beings are never suitable to the requirements of *all* such aggregations.

These considerations are recognized in Secs. 3479 of the Civil Code and 370 of the Penal Code, as amended in 1874.

They create or recognize as many different rights to the use of the streams of the State and their waters as the *customs* of the people in their respective vicinities have shown, or may show, to be the wisest use to which they can be applied. There could have been no wiser, no more beneficial, exercise of the power of legislation than this.

Under its operations a stream which the practical experience of the people has shown, or may show, was more valuable for floating logs could not be so used as to impair its use for *that* purpose.

A stream which this practical experience has shown, or may show, was more valuable for mining purposes could not be used so as to obstruct its use for *that* purpose. A stream which this experience has shown, or may show, was of the greatest good to the greatest number, when its waters were used for agricultural purposes, could not be used so as to obstruct its use for *that* purpose.

Now, so far as the *remedy* is concerned, it is clear that these enactments *do* recognize as *legal* those uses of the streams of the State and their waters, which were, or are, or may become customary, or which may be authorized by the State, whether those *customary* uses, or such as may be permitted by the State, are or are not consistent

with the rights of an English common law riparian proprietor.

Can any considerations be advanced why these enactments, being, as they are, strictly in *pari materia* with those sections on the same subject, permitting the appropriation of water, should not be read in connection with the latter, and as an aid in their construction? If they can be, and are so read, I respectfully submit that the conclusion that Sec. 1422 of the Civil Code was intended or designed to save any *rights*, the equivalent of the riparian rights of an English riparian owner is *simply impossible.*

I take it that it will scarcely be denied that the legislative power extends to the saying of what shall or what shall not constitute a nuisance, both public and private. I shall certainly waste no time in attempting to prove that it does.

We have then here an authoritative definition of that which constitutes an illegal use of the streams of this State and their waters.

It does not embrace or include the supposed esthetic right of an English riparian owner to have the waters of the stream come to him undiminished or unadulterated in their flow. The whole provision is based upon entirely antagonistic ideas, viz., of *usefulness*, of *application*, of *consumption* and of *appropriation.* The English common law of riparian rights has as its very foundation the principle that flowing streams *shall continue in a state of nature*, and all uses of them which were permissible were such as would, in the smallest degree, interfere with their continuance in

this state of nature. The statutes of this State which I am considering necessarily recognize and legalize the uses of water in such a manner that the streams *cannot* be and continue in a state of nature.

In the case at bar, plaintiffs have chosen to stake their case upon the proposition that any use of the waters of a stream which interferes with its *natural flow* and its natural *effects* is illegal and constitutes a nuisance which entitles them to the extraordinary remedy of an injunction to restrain and prevent such use. A glance at the amended complaint, from folios 97 to 102 of Vol. 1 of the Transcript, will show that this assertion is strictly correct.

Not one word can be found in the complaint from which it can even be *inferred* that the defendant is using the water in any other manner than such as is and ever has been *customary* on that stream, or in that section of the State, or that it was not permitted and authorized by the State to make the diversion of which complaint is made. Neither is there a syllable contained therein which can be tortured into an allegation that the plaintiffs had been *accustomed* to use the water in any manner which is interfered with by the defendants' appropriation and diversion.

The whole burden of their complaint in this respect is that if the defendant had not made the diversion complained of the waters would "*naturally*" have flowed down to and upon their lands, and would have "*naturally irrigated them.*"

The *very* purpose of the statute permitting a

diversion of the waters of a stream was to legalize a disturbance and interference of its *natural* flow, and the *only possible intent* of the present statutory definition of a nuisance in this regard was to prevent the disturbance and interference of the *natural* flow of a stream from being construed to be a *nuisance* or otherwise illegal, simply for the reason that such inference disturbed the *natural* flow of the stream. There is no requirement in the statute that "*the customary manner*" of the use of the water shall not conflict with either the *natural* flow or the *natural* use of the same. If that be the idea of the amendments of 1874, they would have been useless, and they cannot be tortured into the expression of such an idea.

The plaintiffs' case then rests *solely* upon the existence of a right in one who owns land on a flowing stream to demand and require that *nothing* shall be done by any one higher up the stream which will interfere with the *natural* flow of that stream, or with the *natural* effects of that flow. If I am correct in my interpretation of Sections 3479 of the Civil Code and 370 of the Penal Code, no such *right* exists, whether these sections be or be not read as in *pari materia* with the provisions allowing water to be appropriated, and if I am right in this interpretation, the plaintiffs' complaint fails to state a cause of action.

The trial Court finds as to the waters of Kern River—the stream whose waters are in question in this case—"That ever since the year 1864 and earlier it has been *customary* for all parties desiring to do so to divert, appropriate and convey said

waters" onto the lands near the same which could be irrigated thereby. (Finding 62, folio 429 of Vol. I of the Transcript.) From this it is apparent that the defendants' acts which are here complained of cannot be a nuisance under either Section 3479 of the Civil Code or Sec. 370 of the Penal Code. Defendants' appropriation and diversion being for the use of the water in the *customary manner*, and in pursuance of authority of law were not illegal, and could not have been an infringement upon any rights of the plaintiffs, which would entitle them to the remedy they seek. A few words will make this last proposition very plain. The plaintiff here seeks an injunction, not as an ancillary remedy, but as the very remedy itself.

I take it that no proposition is better settled that an injunction cannot be granted to restrain the doing of an act unless the doing of the act complained of will be a breach of some *obligation* which the party doing or threatening to do the act complained of *owes* to the party complaining.

This proposition is digested or codified in Sec. 3422 of the Civil Code.

This obligation may be created either by contract between the parties, or as the result of the imposition upon one party of a *duty* by law. In the case at bar there were no contract relations between the parties. If, therefore, the defendants owed any *duty* to the plaintiffs that duty must have been the result of some law *forbidding* the defendants from diverting the water of which diversion the plaintiffs complain.

So far from the law *forbidding* the diversion it has *expressly* authorized it, and it logically follows that if the plaintiffs had any rights which were infringed by defendants' acts they were *not* such rights as can be protected by injunction.

I submit with perfect confidence that a careful consideration of those historical facts, and of those principles and rules of jurisprudence to which I have called the attention of the Court can lead to no other possible result than the establishment of the following proposition, viz.:

1st.

That there is no legal *natural* relation between the waters of a stream and the lands through which it may flow, which gives to the owners of those lands an *exclusive* right to the use of those waters.

2nd.

That the *legal* connection between the waters of a stream and the lands through which it may flow, so far as the uses of the water are concerned, is the *creation* of the law of the land where the water and the land is situated.

3rd.

That this law of the land which creates this legal connection between water and the lands through which it flows, is but the exercise of the ordinary sovereign power of legislation, which, unembarrassed by the intervention of a contract,

is, like all other legislation, subject to such changes and modifications as the public policy of the law-making power may at any time dictate. And no *vested* rights as against the Legislative power can be created by an exercise of an ordinary power of legislation.

4th.

That under the former governments of California, all the flowing waters of the territory were either absolutely dedicated to the *common use* of the inhabitants, subject to the regulation and control of the government, or else the whole subject matter of the *uses* of the waters of the streams of the territory were subject to the legislative control and management of those governments.

5th.

That the State of California succeeded to all the governmental functions of those former governments.

6th.

That the State of California has never, by any Act of its Legislature, attempted to convey these flowing waters or their use into the private ownership of *anyone*. And if any Act of its Legislature is susceptible of any such construction, it contains no single element of a *contract*, and therefore was but an ordinary exercise of the legislative authority and subject to such changes and modifica-

tions as the public policy of the State might at any time require.

7th.

That from the time of the existence of the State down to the present time, the State has, by acquiesence, recognition and express legislation, declared its public policy as to the waters of the State to be one of *use* for the common good and for the greatest benefit and advantage of the greatest numbers—regardless of the particular *locality* where the *use* was to be exercised. In other words, it has been continuously, and still is, a public policy of *appropriation.*

The adoption by this Court of these several propositions as the law of the subject-matter would results in leaving the flowing waters of the State just where the wisest of public policies would place them, viz : *Subject to the control and regulation of the legislative power of the State.*

It would save these waters, in their use, from the private ownership of the owners of the banks of the stream, with all of the disastrous results—public and private—which must inevitably flow from such a private ownership ; and on the other hand, it would be the assertion of principles which necessarily deprive the appropriators of water under the present laws of the State of the slightest element of a monopoly of those waters, and it would save to the State the right to perfect, from time to time, as occasion may demand, the mode

and manner of the uses of those waters until justice to *all* had been attained.

The bare fact that *justice to all* should be the end and aim of all legislation upon a subject-matter of general interest and the manifest impossibility of reaching this end as to the subject-matter under consideration by any *single* legislative attempt, conducted by men without any practical acquaintance with the peculiar requirements of an arid country, seem to me to be a most persuasive argument why the Court should adopt as a law of this subject-matter the several propositions which I have here stated and urged.

THIRD.

In the prevailing opinion in this case, upon its former hearing, it was held that if the defendants' appropriation and diversion was made while the State was the owner of the land which it subsequently conveyed to the plaintiffs, then the plaintiffs had no cause of action, and could not be heard to complain of defendants' act of diversion. This was upon the theory that while the State owned the lands which it afterwards conveyed to the plaintiffs it was as to those lands the riparian owner of all streams that ran through the same, and could *give* these incidents of riparian ownership to whom it pleased.

Upon this question I desire to submit to the Court the following proposition, viz:

If the State, as a private riparian owner, could

give its incidents of riparian ownership to whomsoever it pleased, it could renounce and waive all of its incidents of riparian ownership in favor of any one who could make a beneficial use of those incidents. Or, in other words, *the State, as an owner of lands to which were attached the incidents of riparian ownership, could disannex or sever those incidents from its own lands, and having manifested its intention to separate those incidents from the lands, which it owned, its subsequent conveyance of the land carries only the land, without any of those incidents, and to the same extent as if those incidents had never existed.*

I submit that the action of the State upon this subject manifests a most unmistakable intention that, if any of its lands were possessed of those incidents which are here asserted as the rights of an English riparian owner, those incidents *should be separated from the land itself*, and be enjoyed independently of the use of the land. An examination of the State's action in this regard, I submit, must demonstrate that in so far as the State's lands were concerned, the State *intended* to sever from those lands any incidents that they might possess which would interfere with its public policy that the right to the use of the waters of the streams of the State might be acquired by appropriation.

Look at these Acts, and see what their provisions most resemble—a provision *for a future gift of those incidents*, or *an immediate present abandonment, renunciation and waiver of them.*

Take the Act of May 15th, 1854, creating a Board of Water Commissioners, etc., for Los Angeles, Tulare and other counties (Statutes of 1854, page 180). This Act, as I have before shown, was applicable to the territory now forming the County of Kern. *Its provisions are applicable to the waters in question to this case.* At the time of its passage the State was the absolute owner of the lands described in the complaint in this action.

This statute provides in terms for the diversion and appropriation to the public use of *any* of the waters in *any* of the territory to which it applies. Now, if there were in this territory any private proprietors who had such vested interests in water that this Act could not apply to them, it certainly did apply to all interests to which the power of the State could extend. This power certainly extended to the *State's* interests in those waters, whether those interests were those of the riparian owner of land or were of a governmental character.

The 14th Section of this Act provides, that

"No person or persons shall direct the waters of any river, creek or stream from its natural channel, to the detriment of any other person or persons below them on any such stream, unless previous compensation be ascertained and paid therefor." * *

It certainly cannot be contended that the statute intended to preserve and protect the rights of *the State* as a riparian owner upon any of those streams.

Now, what would have been thought of a con-

struction of this Act which would have made it obligatory upon persons, diverting water under its provisions, to pay the State this "compensation" for the destruction, or impairment, or invasion of *its* riparian rights, before the diversion of the water could be made? Would it not have been ridiculous in the extreme? Grant, for argument's sake only, all that can be claimed on the other side, viz., that this Sec. 14 of this Act of 1854 was a recognition of the existence of the English common law of riparian ownership, and was intended to protect such rights, I submit that there can be no pretence that its purpose was to protect any rights which the *State* might have as a riparian owner.

What then became of the State's right as such riparian owner, granting, for argument's sake only, that it possessed such right? The answer is patent and inevitable. Such rights were *then waived, abandoned and renounced* in favor of whomsoever might thereafter appropriate and divert the waters to which the Act applied.

By this Act of 1854 the State declared its public policy as to such rights of riparian ownership as it might possess in the territory now constituting Kern county, that the waters which imparted the riparian character to its lands should be subject to the public use, and might be diverted from the streams upon which its lands were situated.

A public policy, as long as it remains unchanged, is necessarily as much the law of the land as is any other law. Has the State ever

changed that public policy which is so unmistakably announced by this Act of 1854? It has changed it, but only by way of its enlargement and extension. The Act of 1854 was special and local in its operation, and the waiver and renunciation, which it made of any riparian rights the State might own were made only for public use, and as to its lands and the waters of a particular locality. By the enactment of Sec. 1410, *et seq.*, of the Civil Code the same public policy was extended to the entire State, and so that the State's waiver of any riparian rights it might possess was extended to every individual who could use the waters for a "useful or beneficial purpose." But the great public policy that the State would and did renounce and waive all its claims, and therefore those of its subsequent grantees, as a riparian owner to the waters of the streams upon which it might own lands remains absolutely unaffected by any legislation subsequent to the statute of 1854. *That* statute is still in force—it is one of those which is kept alive by the Codes themselves.

I respectfully submit that since the 15th of May, 1854—even if the State as a riparian owner of the lands now claimed by the plaintiffs in this case, had been entitled to all the incidents of the English riparian proprietor—those incidents were by the Act of the State *severed from the land at that time.*

Since the 15th of May, 1854, every conveyance which the State may have made of any of the lands now claimed by the plaintiffs was made

subject to the public policy declared by the enactment of that date, and every such conveyance *must* be construed as if it contained in terms a provision "that nothing herein contained shall be construed as a conveyance of any rights which the State may have waived, renounced, or abandoned to public use," by that Act of May, 1854.

And this construction works no injustice or wrong to the plaintiffs. The Act of 1854 was a public Act. Its existence was known to the plaintiffs—it had been on the statute book for years before there was any pretence that plaintiffs, or any of their assignors or grantors, had even conceived the idea of purchasing these lands from the State.

Not only are the plaintiffs chargeable with knowledge of the existence of this public law, but they must also be chargeable with knowledge that under its provisions, or that of other similar laws, the waters of this very Kern River (for years before they had any connection with this land) had been *accustomed* to be diverted from the stream for irrigation purposes, by whomsoever could make that use thereof.

FOURTH.

Before the recent oral argument in this case, the Court suggested several questions upon which it was "particularly desirous of hearing counsel."

Notwithstanding this request of the Court, I did not discuss these questions. My explanation and apology (if necessary) for this was that the

time allowed for oral argument was barely sufficient to permit me to present in an imperfect and unsatisfactory manner my views upon the common law doctrine of riparian rights and upon the existence in this State of those rights and their application to lands owned by or acquired from the State of California. I considered myself justifiable in appropriating all of my time to the discussion of this branch of the case, not only because of the great and paramount importance of the question and the very serious consequences involved in its solution, but because the decision of this branch of the case in favor of the defendants would render unnecessary the consideration of all the other issues and questions involved in this appeal, including those to which the special attention of counsel has been invited by the Court.

Having presented my views fully upon the question of the existence and applicability in California of the English doctrine of riparian rights, and having established to my own satisfaction, and I trust to the satisfaction of this Court, that the right to the use of running water always belonged, in California, to the public, and never was annexed to the lands through or over which it flowed, and never belonged to the private owners of the banks of the stream; I will now give my attention to the questions upon which the Court expressed itself as particularly desirous of hearing argument. In doing so, I will, for the occasion, ignore the position taken by me as to the effect of the adoption of the common law as the rule of

decision in this State, and assume, for the purpose of the argument, that the doctrine of riparian rights respecting the use of water did at one time prevail in this State in its fullest extent.

The first question suggested by the Court is as follows:

"*Did the Court err in sustaining defendants objections to the introduction of evidence by the plaintiffs after the parties had once rested, to prove what was the condition of Buena Vista Slough where the 'De Weber road' crossed it?*"

My answers to this question are, and I shall endeavor to show the Court:

(1.) That in this ruling the Court did not err.

(2.) That if the Court did err, the error was immaterial, and did not injuriously affect the plaintiffs.

I.

The Court did not err.

The evidence offered by the plaintiffs and excluded by the Court was to prove the condition of Buena Vista Slough where the "De Weber road" crossed it, *with respect to its existence as a water course* at that crossing.

The objection to this testimony was, that it was inadmissible *for the purpose for which it had been offered.* The evidence was relevant and material, as it bore immediately and directly upon plaintiff's

case, and was calculated to support a material allegation of the complaint essential to the plaintiffs right to recover. The plaintiffs had alleged that Buena Vista Slough was a running stream, having a continuous uninterrupted channel from a point some miles above the point where the De Weber road crossed the slough, down to the land of the plaintiffs, which was some distance below the said De Weber crossing.

Plaintiffs' cause of action necessitated the establishment of this allegation, and could not be maintained without proof of the existence of such a stream, and of its *continuity* from the point at which the water was diverted by the defendants down to the plaintiffs' lands. To establish the continuity of the running stream between these points involved, necessarily, the consideration of the condition of the slough at every intermediate point between the extreme points, and necessitated proof on the part of the plaintiffs of the character and condition of the slough, *everywhere throughout its course*, from the point of diversion down to the plaintiffs' lands. The proof of the character and condition of the slough at the crossing of the De Weber road, and the establishment of a running stream at that crossing, was an essential part of plaintiffs' case in chief; and if the rejected evidence had been offered at the proper time, or for the proper purpose, it ought to have been, and would no doubt have been admitted by the Court.

The evidence was offered by the plaintiffs after the defendants' case had been closed. It was not offered in further support of plaintiffs' case. If it

had been so offered, the Court might have, *upon good cause shown*, and in the exercise of its discretion, admitted the evidence.

C. C. P., §§ 20, 42, 607.

The evidence was offered for the express purpose of *rebutting* the testimony of certain witnesses on the part of defendants, who had sworn that at the crossing of the De Weber road Buena Vista Slough had no channel, and was not a running stream of water, as claimed by plaintiffs and testified to by plaintiffs' witnesses.

It is a rule of practice, that evidence which is offered and admitted for a specified purpose, can be considered for that purpose only.

McDougall vs. *Maguire*, 35 Cal., 274.
Roff vs. *Duane*, 27 Cal., 570.
Henry vs. *Evarts*, 29 Cal., 612.
Tochman vs. *Brown*, 33 N. Y. Sup. Ct., 409.
Travis vs. *Burge*, 24 Barb., 622.

And for the same reason, when evidence offered for a specified purpose is, upon objection, excluded, such exclusion is not error, unless the evidence was admissible for the purpose stated in the offer.

The question to be considered, then, is not whether the evidence, as to the condition of the Buena Vista Slough at the De Weber crossing, was relevant or material, but whether it was admissible as proof *in rebuttal* of any portion of defendants' case.

The Court rejected the proposed evidence on *the sole ground that it was not proper rebutting*

evidence, and I maintain that the Court was right. It was in no sense rebutting evidence.

I know of no more accurate definition of rebutting evidence, and I would ask for no definition better suited to my present purpose, than that furnished by Mr. McAllister, and read by him with approval during his oral argument to the Court.

"Now, rebutting evidence," says the counsel, "is well defined by Woodruff, Justice, afterwards United States Circuit Judge, in 3d E. D. Smith's Reports, p. 323–4. 'Counsel misapprehend, I think, the meaning of the term rebutting evidence. *It means not merely evidence which contradicts defendants' witnesses, but evidence in denial of some affirmative case or fact which the defeudant has endeavored to prove.*'"

Now, assuming this to be the true definition of rebutting testimony, the test to be applied to the rejected evidence under consideration is whether its effect would have been merely to contradict the defendants' witnesses, who had testified as to the condition of the slough at the De Weber road crossing, or whether it was in denial of *some affirmative case or fact* which the defendant had endeavored to prove. The offered evidence would have had the effect certainly of contradicting the defendants' witnesses. They had testified, *in contradiction of the testimony of plaintiffs' witnesses*, that at the point where the DeWeber road crossed the slough there was no channel and no running stream, and the evidence offered by the plaintiffs

was to show by additional or cumulative testimony that at said crossing the slough *had* a defined channel and was a running stream.

But what *affirmative case or fact* was there which the defendants endeavored to prove by these witnesses, and which the plaintiffs' evidence was offered to deny?

The defendants' witnesses had testified that they had gone upon the ground and had crossed the ~~slough~~ swamp at the De Weber crossing, and had carefully observed the condition of the ~~slough~~ swamp and had found no slough or channel at that point. This was the only affirmative testimony given by them. I am willing to concede that if the plaintiffs had desired to contradict this portion of their testimony, and had offered to show that these witnesses had *not* gone upon the ground, nor made any inspection whatever, or had crossed the ~~slough~~ swamp, if at all, at another and different point, this might have been proper rebutting evidence. But the evidence was not offered to contradict this part of the testimony. It was offered to contradict the testimony of the witnesses solely as to the *condition of the slough* at the specified point. As to the condition of the slough the testimony had not tended to prove an *affirmative case or fact.* The testimony had been *negative* in its nature, and in direct denial of an affirmative case or fact, which the plaintiffs had endeavored to prove. *It was itself rebutting testimony.* The burden of proof was upon the plaintiffs to show, as part of their case in chief that there was a *well-defined continuous running stream* from Kern River down to their lands. To show

that the stream was *continuous* involved the positive proof of its existence *at every intermediate point*, including the crossing of the De Weber road. This burden was assumed by the plaintiffs, and they not only introduced testimony in chief to prove the continuous, uninterrupted channel and flow of the water in Buena Vista Slough, but they are now contending in this Court that they did succeed in proving that Buena Vista Slough was throughout its extent from Kern River to their lands a continuous, well-defined channel, with running stream. If this be so, they must necessarily have proved, or at least endeavored to prove, *the affirmative fact*, that at the De Weber crossing, as well as at all other points on the Buena Vista Slough, that slough was a runuing stream. The testimony of defendants' witnesses being to the effect that this was not so, and that the testimony of plaintiffs' witnesses in this respect was not true, there was no affirmative case or fact made or proved by them, to which rebutting testimony of plaintiffs could have been directed.

To demonstrate this it is only necessary to consider the character of the testimony offered in rebuttal. Was it negative in its character? Was it to disprove something attempted to be affirmatively established as a fact by the defendants? No; the proposed testimony was to prove affirmatively a condition of Buena Vista Slough and the precise condition of that slough, which they relied on to make out their case, and to the proof of which their evidence in chief had been directed. How can evidence, which is not only proper but

necessary evidence in chief, become proper evidence in rebuttal in the same case? The evidence which was offered in the case as rebutting evidence, and excluded, would have been a mere repetition by the same witnesses of evidence which was essential to plaintiffs' case in chief.

When this evidence as to the condition of the Buena Vista Slough at the De Weber crossing was offered by the plaintiffs, the witness having testified that he had made a survey and taken elevations and levels across the channel at that point and taken the width and depth of the water where the defendants' witnesses had testified *that there was no channel and no slough,* the Court sustained an objection to further testimony as to the condition of the slough at that point, assigning the following reason for excluding the proposed evidence:

"THE COURT—I think the testimony of defendants' witnesses, all of them, upon that point, was not uniform, and that *the testimony of plaintiffs' witnesses was that there is a slough down there.* It appears to me that IT IS JUST SIMPLY CUMULATIVE TESTIMONY."

Trans. Vol. 5, fol. 110, p. 28.

And it was "*just simply cumulative testimony*" unless the Court and plaintiffs' counsel are both mistaken.

The Court more than once repeats this assertion. In a subsequent stage of the case, when

similar evidence was offered, the Court said with emphasis :

"I think this thing is progressing rather far. In the first place I have reiterated time and again there has been testimony cumulative introduced by the plaintiffs in reference to those sloughs from Wybel Camp, in fact *from Buena Vista Lake down to the North line of Map No. 2.* You are seeking to go into the whole thing again, and by *the same witnesses who testified fully to it before* and by other witnesses who testified before to *having been in boats down the slough.* It is but reopening the whole case again."

In this reiterated assertion the Court is fully sustained by the record. The witnesses offered by the plaintiffs in their evidence in chief testified both generally as to the existence and continuity of the slough, and *specifically as to every section and foot of the grounds claimed to be covered by the Buena Vista Slough.*

Upon this point we refer the Court to the evidence of plaintiffs' witnesses, cited from the record in the Brief of Mr. Haggin for respondent, part 2, pages 187-8.

The Court is fully sustained, not only by the records, but by the express assertions of counsel for plaintiffs.

In his oral argument, Mr. McAllister stated the plaintiff's case as follows: "We produce our titles, then we show this diversion, the building of this dam across the river, just above Bakersfield, preventing the flow of the water coming down Kern river: Then we show by a very large number of

witnesses, about twenty-five, of the old residents of the county, men who have lived at Bakersfield for many years, and men who have lived in the swamp land district for many years. * * Well, *we proved the tracing of this slough from the entrance in the valley of the waters down to Lake Tulare, a distance of fifty miles, and we proved that that passage was such that it could be made by boats.*"

"JUDGE MCKINSTRY.—You proved a continuous flow ?"

"MR. MCALLISTER.—We proved *a continuous flow, by about twenty-three witnesses.* * * I I was going to say that we proved that men in boats had navigated from Buena Vista Slough down to Lake Tulare. They have taken a boat and rowed down the slough till they got there, about twenty-five miles, and *that is pretty good evidence, pretty emphatic evidence of the existence of a water-course*, and rowed passed our lands, and certainly rowed beyond Bonestal's about twelve miles, a place mentioned already and pointed out on the map as what they call the terminus of the principal slough, about twelve miles further down towards Lake Tulare."

As additional support to the Court, I refer to the statement of Mr. Houghton.

"MR. HOUGHTON—We put on our witnesses, and traced the slough down. We did not take them across at two or three different points, and then asked them if there was a continuous slough.

We traced the slough down, and *after following the slough continously*, we then asked them whether or not there was a continuous channel.

"MR. HAGGIN—Do you mean *that you traced with the witnesses that slough from one end to the other* before you asked such a question?

"MR. HOUGHTON.—I mean to say that *we did.*" (Trans. IV, fols. 645–6.)

In the case of *Silverman* vs. *Forman*, 3 E. D. Smith's Reports, page 322, in which counsel for appellants find the definition of rebutting testimony, which I am willing to accept as correct, viz.:

"*Rebutting testimony must be in denial of some affirmative case or fact which the defendant has endeavored to prove.*" The facts were as follows:

"After the plaintiff had rested the case upon the evidence of his witnesses, who testified to the blow, and after defendant had called witnesses to disprove the striking, the Court refused to permit the plaintiff to call witnesses to prove that the defendant had admitted that he struck the plaintiff." The Court above held that this was not error, saying in addition to what I have already quoted from the opinion.

"The plaintiff was strictly bound to prove the allegations in his complaint, and give such testimony in support of those allegations that *as to them he was willing to trust his case upon the proofs given.* The defendant then took the bur-

den of 'rebutting' that proof, and unless there was some reason assigned for deviating from the rule, the Court below rightly exercised their discretion in not permitting the plaintiff to open his case again for the purpose of accumulating testimony to the very point to which he had already examined such witnesses as he thought proper."

Was not that the precise condition of this case when the evidence, as to the existence of a water-course at the De Weber crossing, was offered by the plaintiffs?

The plaintiffs were strictly bound to prove the allegation of their complaint, that *Buena Vista Slough was a continuous water-course from a certain designated point down to the plaintiffs' lands*, and to give so much testimony in support of this allegation that, as to it, they were willing to trust their case upon the proofs given. They did give such testimony as, according to their contention in this Court, was *sufficient to prove this allegation*. The defendants then took the burden of "rebutting" that proof by contradicting the testimony of plaintiffs' witnesses, and showing that at the De Weber crossing, and at other places where they had testified to the existence of a water-course or slough, there was no water-course or slough. Under these circumstances, to use the language of the Court in the case cited, "unless there was some reason assigned for deviating from the rule," and there was none, "the Court below rightly exercised its discretion in not permitting plaintiffs to open their case again, for the purpose of accumulating testimony

to the very point to which they had already examined such witnesses as they thought proper."

In the case of *Marshall* vs. *Davis*, 78 New York, 420, the defendant testified that a certain conversation with the plaintiff had taken place. After the plaintiff had testified that other conversations might have been had, but that no conversation of the nature testified to by the defendant ever took place, the defendant was not permitted in rebuttal to prove another conversation as to which he had not previously testified, "even *though it tended to support his original statement.*" The Court of Appeals says:

"No rule for the conduct of trials is more familiar than that the party holding the affirmative is bound to introduce all the evidence on his side before he closes. (*Hastings* vs. *Palmer*, 20 Wend., 225.) He must exhaust all his testimony in support of the issue on his side before the testimony on the opposite side has been heard. (*Ford* vs. *Niles*, 1 Hill, 301; *Rex* vs. *Stimpson*, 2 Carr & P., 415.) He can afterwards introduce evidence in rebuttal only. Rebutting evidence in such cases means not merely evidence which contradicts the witnesses on the opposite side and corroborates those of the party who began, but *evidence in denial of some affirmative fact which the answering party has endeavored to prove.* (*Silverman* vs. *Foreman*, 3 E. D. Smith, 322; 2 Carr & P., 416.) * * * * The testimony on the part of the plaintiff was that other conversations might have been had, but *that no conversation of*

the nature testified to by defendant ever took place. This was a mere denial, and not proof of any *affirmative fact* which the defendant had the right to rebut."

And so I say in our case. The testimony that at the De Weber crossing there was no water-course where it was incumbent upon the plaintiffs to prove, and where their witnesses had testified that there was a water-course, was "a *mere denial*, and not proof any affirmative fact which the plaintiff had the right to rebut."

In the oral argument of Mr. McAllister he attempted to draw a distinction between general and specific evidence, and argued that when the evidence of the party having the burden of proof is general, and the contradictory evidence is addressed to a specific part of the plaintiff's general evidence, the plaintiff can rebut the defendant's negative evidence by specific affirmative proof in further support of his original case. And counsel illustrates his point in this way: "Of course we understand the general proposition, that we have no right to go into our general case again, but we say if, in an action of ejectment, we prove a large enclosure and show possession, and the witnesses of the defendant say that there was a gap of twenty feet in that fence and therefore it would not keep out cattle and people from this enclosure, and it was not possessed, and we call a witness and say, 'Now, was there just at that place where this man says there was a gap of twenty feet, was there any gap there? No, sir, there never was a gap there, and it has always been an

entire and whole fence,' I think that is strictly rebutting."

I do not recognize any such rule or rather exception to the general rule respecting rebutting testimony as that contended for by counsel. It would be strange if a plaintiff could by the generality of his proof save to himself the right to rebut the negative proof of the defendant by additional affirmative (because more specific) proof of his case in chief.

In the case supposed by counsel of an action of ejectment, in which plaintiff, relying upon prior, actual, exclusive possession, had proved his case, by showing that the premises had been actually enclosed by a fence, if the defendant had relied upon negative proof, showing that at one or more points there was no fence, I contend that it would not have been proper rebutting evidence to show that there was a fence, where defendants witnesses testified that there was none. For what affirmative fact or case made by defendants' witnesses would such testimony rebut? The testimony, that at certain points there was a *gap*, was not affirmative proof. The existence of a gap in the fence is another mode of expressing the absence of a fence—a negation of an affirmative fact alleged by plaintiff, and essential to his case. Under the name of rebutting the defendants' testimony, the plaintiff would be simply adding cumulative evidence, or perhaps repeating evidence already given to strengthen his original case. But the supposed case of counsel is not

applicable to our case, for in our case the plaintiffs did not confine their evidence in chief to the general character or condition of Buena Vista Slough. Their evidence was both general and specific. It went to show that there was a continuous water-course from the point of diversion to the plaintiffs' land, and then specific proof was made of the existence and condition of the alleged water-course throughout its entire extent, and as respects every intermediate point. Surveyors meandered the alleged slough, and maps of such actual surveys were introduced, delineating the lines and location of the slough from one extreme to the other, and witnesses testified to having gone through the slough its entire length in boats.

The illustration of counsel would have been more apt if he had stated that in the supposed ejectment suit the plaintiff's witnesses had testified that the premises were enclosed throughout by a picket fence and that they had gone around and seen every picket in its place, making a perfect fence and enclosure, and that then the defendant's witnesses had testified that they had gone around and in one or more places had found no fence at all (or one or more gaps). Would it be contended by any one that in such a case plaintiff could offer a rebutting evidence, the testimony of the same or other witnesses, to reiterate the positive proof that the fence was perfect and complete? I say certainly not. Well, the case supposed is our case exactly, as I have shown.

II.

If the Court did err the plaintiffs were not injuriously affected by the ruling.

The exclusion of this evidence was of no consequence, for the reason that certain findings of the Court rendered the condition of the Buena Vista slough at the crossing or the De Weber road an unimportant and immaterial fact.

These findings were to the effect:

1st. That plaintiff's lands did not border upon Buena Vista slough; and 2d, That Buena Vista slough was not a continuation of Kern River; and 3d, That Buena Vista slough ceased to be a water-course at a long distance from plaintiffs' lands and before it reached the crossing of the De Weber road.

The first finding upon these questions is the one numbered "3" (Record Vol. 5, fols. 687–8) and is as follows:

"That the said lands of plaintiffs are situated *in* and form a part of the body of swamp and overflowed lands designated in these findings and on the map hereto annexed as Buena Vista Swamp; *but that said lands do not, nor does any part thereof border on Buena Vista Slough,* nor are said lands nor any part thereof situated along Buena Vista Slough except that as is set forth in findings 18, 71 and 72, the channel of said slough is traceable through the West half of Section 10 and the Northeast quarter of Section 5, in Township 30, South range 24 East, and as far

North as Section 24 in Township 29, South range 23 East Mount Diablo Base and Meridian; and that the said lands of plaintiffs are as shown on the annexed map situated in said Buena Vista Swamp, to which the term Buena Vista Slough is sometimes applied."

Finding 18 is as follows, viz: (Record Vol. 5, fol. 713–14):

"That in part the diagram annexed to the complaint herein shows the courses and channels of Kern River and the sloughs and lakes in said complaint mentioned, but not fully and correctly, and except in the particular in finding No. 72 specified, the same are correctly and fully shown and delineated on the map hereto annexed, marked Exhibit "A," and made a part of these findings and said map, marked "Exhibit A," correctly shows the body of swamp and overflowed lands in Kern County, which is referred to in these findings as "Buena Vista Swamp."

Finding 71 is as follows (Record, Vol. 5, folios 783-96):

"That from the point where New River enters Buena Vista Slough a channel extends southerly into Buena Vista Lake, as shown upon the map hereunto annexed. That from said point where said river enters said slough to and into Buena Vista Swamp as far north as Section 24, Township 29 south, Range 23 east, there is a traceable, but in places, detached channel (shown on the annexed map, and thereon designated as Buena Vista Slough), of varying width and depth.

That from the river northerly to said swamp said channel is well defined, but *after reaching said swamp* to its northern extremity in said Section 14, said channel is not well defined nor continuous, and is not a defined natural channel with bed and banks, but consists more of a series of holes than a regular water-way. That said channel terminates in, and is not traceable beyond said Section 24; that whatever waters have gotten down into said swamp without the aid of the artificial obstructions, in these findings mentioned, before reaching any of said lands of plaintiffs, have not been confined to said channel, but have spread generally and indefinitely over said swamp, and that said waters do not constitute a regular flowing stream or water-course, but consist, in addition to the seepage and percolation, in these findings mentioned, of occasional bursts of water, which in times of freshets or melting snow overflows the banks of the river above, or flow out of Buena Vista and Kern Lakes after having been stationary therein, and inundate the whole of said swamp as far northward as the water reaches. That said swamp, though sloping slightly toward the north, is generally flat and level, and though interspersed throughout the same there are channels, hollows and depressions, either natural or made in part by the actions of the floods and waters, such channels, hollows and depressions have no continuity or connection one with another, and are found running in all directions and generally throughout said swamp. That whatever flow or movement said waters have, or ever had,

is not, and never was, usual or accustomed, but is and was only occasional and sluggish, and in no manner confined to said channels, hollows or depressions."

Finding 72 is as follows (Record, Vol. 5, folios 787–8):

"That the portion of Buena Vista Slough from New River to Buena Vista Swamp, though continuous and well defined, is in places shallow, and does not constitute a water-course, and the waters which form the overflows elsewhere in these findings mentioned, reach said swamp over the surface of the country; are not confined to the bed and banks of said slough, but spread and flow as well over the adjacent country as through the slough itself; and that such flow is not usual, definite, or accustomed, as is, nor does it correspond with, that of the waters in Kern River, before reaching Buena Vista and Kern Lakes, but is only occasional, as in these findings elsewhere described. That the slough or channel, marked on the annexed map as Buena Vista Slough, is as far northward as, and until reaching, Buena Vtsta Swamp, known as and called Buena Vista Slough; but after reaching said swamp, and ceasing to be well defined or continuous, as in these findings set forth, it ceases to be distinguished as Buena Vista Slough, and the term Buena Vista Slough is then applied to and used to designate the whole of said swamp, and not to any particular channel therein."

In order to a proper appreciation of these four findings, it is necessary that they should be considered in connection with the findings numbered 65, 66 and 67 (Record, Vol. 5, folios 771 to 775).

The substance of these finding is :

1st. That the natural flow of the waters of Kern River, "whether through the South Fork or through Old River, or through New River, is and has always been, to and into" Kern and Buena Vista Lakes (that is, that after said waters reached Buena Vista Slough they naturally flowed in a southerly direction *from*, instead of a northerly direction *towards* plaintiffs' lands.)

2d. That until *1876* (after defendant's appropriation was made) none of the waters of Kern river flowed to or reached the lands of plaintiffs, except "from the unusual and extraordinary overflow of said river, or of Kern and Buena Vista Lakes, or from the percolation and seepage," mentioned in other parts of the Findings ; and

3d. That in December, 1875, (*after defendant's appropriation was made*), one Souther commenced the erection of a dam across Buena Vista Slough south of the point where Kern river emptied into said slough, which checked the natural flow of the waters of Kern River into Kern and Buena Vista Lakes, and caused said waters to flow in a northerly direction towards and over plaintiffs' lands.

If these findings—and they are all plain, unambiguous, and unsusceptible of misconstruction—

do not *negative* every issue tendered by the complaint, with the view of establishing a cause of action in the plaintiffs', based upon the existence in this State of the common law doctrine of riparian rights, then I submit that no findings of fact *could* negative those issues.

These findings not only negative those issues in the aggregate, but in the minutest detail. They place a negative upon the existence of *every* fact which enters into the constitution of riparian lands as known to the common law of England.

It is not necessary to examine them in detail—a *single* one of them is determinative of the whole question.

The waters of Kern River did not, and never did, naturally flow down to, along, upon, or over plaintiffs' lands. That is enough. It is all that is necessary to determine against the plaintiffs their claim as riparian owners to the waters of Kern River.

In the presence of this *established* fact, what is the use of consuming time in the consideration of such question as to whether there was or was not an obstruction in Buena Vista Slough where the same was crossed by the "De Weber Road?" The state or condition of the slough at that particular point in view of this *ascertained* fact becomes utterly and entirely immaterial and irrelevant.

Can injury ever be predicated upon the erroneous admission or exclusion of testimony which one salient finding renders both immaterial and irrelevant? If the fact be as determined by these

findings (65, 66, 67,) that the waters of Kern river *did not, and never did naturally flow down to, along, upon or over the plaintiff's lands* the time when plaintiff's title to that land had its inception, becomes likewise immaterial and irrelevant, and in the very nature of things, the offered and rejected testimony relative to the condition of the alleged slough at De Weber crossing, as well also that of the certificates of purchase was unimportant.

Neither an obstruction in Buena Vista Slough at the point where it is crossed by the De Weber road, nor the time *when* the State issued its so-called certificates of purchase, could by possibility change the physical fact that the waters of Kern river, when it reached Buena Vista Slough, naturally flowed to the south and in an opposite direction *from* the De Weber road, and the plaintiff's lands.

Take the facts as found in these several findings to which I have referred, and they show in brief that the natural course of the waters of Kern River is through Buena Vista Slough from the point where the waters debouch into that slough at at a point south of *plaintiff's land*, southerly (away from plaintiff's lands) and into Buena Vista and Kern Lakes, and that in time of extraordinary and unusual floods the waters of Kern river fill up these two lakes so that they can receive no more, and that at such times only the floods so created spread out over the plaintiff's lands.

No argument or citation of authorities are needed to support the proposition that lands situated as these findings *establish* the plaintiffs' lands to be situated in their relation to the waters of Kern River could not be held under any view—strict or liberal—of the Common Law doctrine of riparian rights to have attached to them any of those incidents which are known as riparian rights, in so far as the waters of Kern River are concerned.

For the purposes of this question only I accept the doctrine of riparian rights as asserted by plaintiffs in this case, and I say that within the doctrine there announced there must be not only a flowing stream but there must also be proprietors *on that stream* before there can exist any subject matter to which the doctrine can be applied. With the fact *established* in this case that the waters of Kern River do *not* and never *did* naturally and ordinarily flow along upon and over plaintiffs' land, but upon the contrary that those waters do and always have naturally and ordinarily flowed in a direction *opposite to* and *away from* plaintiffs' lands, the plaintiffs could (even in view of the doctrine of riparian rights here asserted) claim with equal propriety that their lands are entitled to the incidents of riparian rights by proof that the Mississippi River flows to the south and empties into the Gulf of Mexico.

The only question which is left for consideration is: *Was there any evidence before the Court below which would sustain this finding?* If there was *any* such evidence, then the fact as found is

legally an *established, fixed* fact in this case, under the uniform decisions of this Court made I think more than once at every term for more than ten years past.

The evidence to be found in the record to support this finding, viz: *That the waters of Kern River do not and never did, in its natural course, flow to, along, upon, or over plaintiffs' land,* is not only most abundant, but of the most convincing and conclusive character. The facts establishing this are testified to by not *less* than *twenty-two* intelligent and reputable witnesses, and they all agree that the *actual* course of the waters of Kern River when they reach Buena Vista Slough in its natural, usual, accustomed and ordinary flow is *southward* to Buena Vista and Kern Lakes and *away from* and in a contrary direction to that which it would have to take in order to reach plaintiffs' lands.

I will not attempt to cite this voluminous testimony, but will content myself with referring to where a part of it may be found.

Witness, James Dixon, Record, Vol. 3, folios 26–27.

Witness, H. Noble, Record, Vol. 4, folio 198.

Witness, C. G. Jackson, Record, Vol. 4, folios 531–2–3.

Witness, E. H. Dumble, Record. Vol. 4, folios 1042 to 1047.

Witness, W. McFarland, Record, Vol. 4, folios 1467–8.

Witness, W. McFarland, Record, Vol. 4, folios 1486–90.

Witness, D. C. McLain, Record, Vol. 4, folios 1531–35.

Witness, William Souther, Record, Vol. 3, folios 665–668.

Witness, T. W. Barnes, Record, Vol. 2, folios 1351–2–3.

Witness, I. Pensinger, Record, Vol. 2, folios 181–2.

Witness, G. K. Ober, Record, Vol. 3, folios 1149, *et seq.*

Witness, N. R. Wilkinson, Record, Vol. 3, folios 334–336.

Witness, William McFarland, Record, Vol. 2, folios 1481–86.

Witness, J. O. Miller, Record, Vol. 3, folios 793–797.

Witness, S. B. Wible, Record, Vol. 2, folios 1846 to 52.

Witness, S. B. Wible, Record, Vol. 2, folios 1852 to 54.

Witness, S. B. Wible, Record, Vol. 2, folios 1926 to 31.

Witness, S. B. Wible, Record, Vol. 2, folios 1931 to 34.

Witness, (and plaintiff) I. C. Crocker, Record, Vol. 2, folios 563, *et seq.*

Witness, (and plaintiff) I. C. Crocker, Record, Vol. 2, folio 2702.

Witness, W. R. McMurdo, Record, Vol. 4, folios 1188 to 1192.

Witness, Sol. Jewett, Record, Vol. 2, folios 255–6.

Witness, R. L. Dixon, Record, Vol. 3, folios 523–4.

Witness, W. James, Record, Vol. 3, folios 164–5.

Witness, W. James, Record, Vol. 3, folios 179–80.

Witness, I. D. Schuzler, Record, Vol. 3, folios 1058 to 1073.

Witness, Geo. H. Mendell, Record, Vol. 3, folios 985 to 990.

Witness, Geo. Davidson, Record, Vol. 2, folios 1473–4.

If the Court will but glance at the testimony of these witnesses, it will be seen that there is not only *some* evidence in the record to sustain this finding of the Court below, viz: That the waters of the Kern River, in its natural and usual flow, never did flow along to, upon, or over plaintiffs' lands; but that the evidence inevitably leading to that conclusion is of the most abundant and convincing character. I submit that no impartial and unprejudiced man can read the testimony of these witnesses—witnesses of the plaintiffs as well as of the defendants upon this point—and come to a conclusion different from that expressed in this finding.

As to the evidence to be found in the record which sustains the other findings which I am discussing in this connection, namely, *those which negative the existence of any stream of water through or by the lands described in the complaint*, I beg the Court's attention to the resume of the

testimony upon that subject, to be found in the respondents' brief upon the former hearing, from pages 105 to 240, and the testimony to support these findings of the trial Court is such that in my humble judgment the trial Court could not have found otherwise.

The findings, then, establish the following propositions *as facts*, viz:

A.

That Buena Vista Slough, from the point where Kern River empties into it *to the northward*, and through the lands described in the complaint, *is not a water-course.*

B.

That the waters of Kern River, which reach the lands of plaintiffs, do so not by way of *any water-course*, but by a general dispersion and spreading over all the lands of Buena Vista Swamp.

C.

That Buena Vista Slough, before it reaches the lands of plaintiffs, and at the southern end of Buena Vista Swamp, loses its character as a stream, and from its entrance into the swamp for the short distance that it can be traced to the northward it is not a continuous stream, but a mere succession of holes and depressions unconnected with each other.

D.

That the natural flow of the waters of Kern River is into Buena Vista Slough. and *thence southerly* into Kern and Buena Vista Lakes, and *away from* plaintiffs' lands, and that none of the waters of Kern River ever reached the lands of plaintiffs except, 1st, by reason of an artificial obstruction placed in Buena Vista Slough, which turned the natural flow of the water from the south to the north; and, 2ndly, in times of exceptional floods, when Buena Vista and Kern Lakes are filled beyond their capacity to hold, when the backwater therefrom overflows the whole country known as Buena Vista Swamp.

Now, if these facts are properly found, I submit that there are no premises left for the application of the common law doctrine of riparian rights—and the question of the existence or nonexistence of those doctrines in this State is eliminated from this case, and the condition of Buena Vista Slough at the De Weber crossing becomes immaterial.

Granting, then—for the purpose of the argument only—that the common law doctrine of riparian rights, as asserted here, is the law of this State, still these findings of the Court below *are necessarily decisive of this case against the plaintiffs.*

These findings involve *every* substantial fact which must be proven in order that there should be any possible claim by the plaintiffs that an ap-

propriation of water on the stream *above* their land is an invasion of their riparian rights. And these findings are as clearly against the pretentions of the plaintiffs as the English language could make them. There was certainly some evidence before the lower Court to sustain *every* one of these findings in their minutest detail as well as a whole.

If Buena Vista Slough, when it reaches the southern point of Buena Vista Swamp, ceases to be a water-course; if from that point the so-called slough or stream is but a succession of disconnected holes and depressions; if the waters of Kern River naturally, and without the aid of obstructions, *flow* ~~northerly~~ Southerly *away from* plaintiffs' lands; if the waters of Kern River, in their *usual*, accustomed, ordinary and natural flow, *never* reach plaintiffs' lands; if the waters of Kern River only reach the plaintiffs' lands *naturally* upon the occurrence of extraordinary, unusual and exceptional floods, filling up and overflowing its natural reservoir—Buena Vista and Kern Lakes—of what consequence is it, whether the Court did, or did not err, in excluding the plaintiff's testimony offered in rebuttal as to the character of Buena Vista Slough at the point where that slough was crossed by the De Weber road?

If there was proof of only one obstruction, which deprived the so-called slough in Buena Vista Swamp of the character of a continuous water-course, and this single obstruction was claimed to be at the point where the De Weber road crossed, then the materiality of the offered testimony would be apparent. But the Court

finds there were a number of these discontinuations or obstructions (see map). The proof that one did not exist would not tend to prove that the others did not exist, and it is manifestly certain that the proof of the character or condition of the slough at the crossing of the De Weber road, could not change or alter the *physical* fact that the lay of the land in that region is such that the waters of Kern River *must* naturally flow in a direction *opposite* to that which it would have to take in order to reach the lands described in the complaint.

The finding of a single material fact may be, and often is decisive of a cause even when the issues are numerous, and in such cases errors in the admission or exclusion of evidence having no relation to or bearing upon the one vital issue become unimportant and are disregarded, because they cannot work an injury to the party against whom the one vital and controlling issue is found. A defendant may join issue upon one such controling fact, and admit every other allegation of his adversary, and still be entitled to judgment upon a favorable finding upon this one issue. In the case at bar if the defendant had admitted that the plaintiffs had acquired title to their lands long before the date of their oldest certificate of purchase, and had confessed that Buena Vista Slough at the point where it was crossed by the De Weber road was a running stream and a perfect water-course, still the findings of the Court, to which I have referred, would have entitled defendants to judgment in spite of these admissions.

Besides, although the Court did not expressly find what was the condition of the Buena Vista Slough at the De Weber crossing, there can be no doubt from the record as to the conclusion of the Court on that point. Being a mere probative fact it was not to be expected that there should be an express finding upon it. But upon the trial the Court expressed a very decided opinion as to the preponderance of proof, and that opinion was in favor of the plaintiff. So decided was the Court that it assigned the conclusiveness of the proof as its reason for excluding further testimony. A Court can in its discretion refuse to hear further testimony upon an issue when both sides have introduced a reasonable number of witnesses, and that party cannot reasonably complain upon whose side the Court declares the preponderance to be. That that party was the plaintiffs cannot be questioned.

When plaintiffs' rebutting witness was offered the Court said :

" There was a number of witnesses who testified positively as to there being a slough there. *I think there were more witnesses on the part of the plaintiff testified that there was a slough there than testified that there was not a slough there.* * * * I think the testimony of defendants' witnesses, all of them, upon that point, was not uniform, and *that the testimouy of plaintiffs' witnesses was that there is a slough down there.* It appears to me it is *just simply cumulative testimony.*"

Trans., Vol. 5, fols. 109, 110, page 28.

FIFTH.

The next question upon which the Court expressed a desire to hear argument is—

"Did the Court err in sustaining defendants' objections to the introduction by the plaintiffs of the certificates of sale by the State of the lands claimed by plaintiffs?"

To this question I make the same answer as to the last, viz :

1st. The Court did not err.

2d. The error, if any, did not work any injury to the plaintiffs.

I.

The Court did not Err.

The injury complained of was made under the following circumstances :

The plaintiffs having closed their case in chief, showing title to the land in themselves under patents from the State of California made in 1876 and subsequently, and a diversion of the waters by defendants, the defendants introduced evidence as to the character of the alleged water-course between the point of the defendants' diversion of the water and the plaintiffs' land, and evidence of the defendants' appropriation of the water diverted in strict compliance with the provisions of the Civil Code, (Title VIII., Division 2,) in May, 1875, and then rested. The plaintiffs then offered

in rebuttal the certificates of purchase from the State referred to.

It is all important to understand *for what purpose* these certificates were offered, for if they were inadmissible for the purpose indicated by plaintiffs in their offer, it was not error to exclude them, although they would have been proper evidence for some other purpose. Had they been admitted expressly for one purpose they could not have been considered for any other purpose.

Roff vs. *Duane*, 27 Cal., 571.
Henry vs. *Everts*, 29 Cal., 611.

The certificates were offered either as additional evidence *in chief* or as evidence *in rebuttal.* If offered as evidence in chief, the plaintiffs' offer could not have been made as a *right*, but plaintiffs must have appealed to the discretion of the Court, and in such case should have shown some "good reason" for the permission sought.

C. C. P., 607, 2042.

The proceedings respecting these certificates are reported in Vol. 5 of the Transcript, page 65, fols. 256-9, and are as follows :

"MR. HOUGHTON.—We offer in evidence a certified copy of a certificate of purchase from the State Land Office, dated the *30th of September*, 1872, signed by Robert Gardner, Surveyor General of the State of California, for all of Sections 5, * * * * * * This is a portion of the land in the complaint described, and in the patents which we have offered in evidence.

MR. HAGGIN.—What is the object of this?

MR. MCALLISTER.—To show the time that our grantors first became interested in this land, showing when our equity in this land commenced. To show when our inchoate right or equity originated. We want to prove whatever title this certificate gave; and *it is rebuttal to the appropriation of the Calloway.* They put forward that title, and we answer it by these certificates. We propose to show the issuance of these certificates to certain parties, and the assignments from those parties to the plaintiffs, and then the issuance of the patents in pursuance of these certificates. We seek to show that we acquired an inchoate interest in these lands at the date of these certificates, and the point of time we became interested in these lands.

Defendants object, on the ground that it is irrelevant, immaterial, incompetent and *not proper testimony in rebuttal.*

THE COURT.—*If it is simply offered as rebutting testimony*, I shall have to sustain the objection.

The plaintiffs except.

This record shows that these certificates were offered in *rebuttal*, and not as evidence *in chief.* No appeal for permission was made to the discretion of the Court, and no "good reason," or any reason, was shown for their admission, or that it would be "in furtherance of justice." And when the Court excluded them, upon the ground that they were *offered as rebutting evidence*, there was

not only no dissent, but assent on the part of the plaintiffs.

If these certificates were offered as *rebutting* evidence, this Court will consider the effect of their exclusion *solely in view of their bearing on the case as rebutting evidence.* If they would have materially strengthened and improved plaintiffs' case in chief, had they been offered for that purpose, still, having been offered strictly in *rebuttal*, their effect, *other than as rebutting evidence*, cannot be considered by this Court.

Were they proper rebutting evidence? And did their exclusion prejudice the case of plaintiffs?

I say no, for the following reasons:

The plaintiffs to establish their case had proved their title to their lands under patents from the State, bearing date in 1876, and subsequently, and had given evidence to the effect that the waters of Kern River had been diverted by defendant, and that, if not so diverted, they would have flowed down to and upon those lands.

By the pleadings it was admitted that the lands were swamp and overflowed lands, and that *as late as the year 1876 they were owned by the State of California.*

Such was the state of the case when the defendant was called upon to make its defense.

In my judgment the defendant might with safety have submitted the case as it then stood without introducing any proofs whatever, as the plaintiffs had not shown themselves to be entitled to any relief at all.

The plaintiffs' alleged cause of action, being

founded on the diversion of the waters of Kern River by defendant, could only be established by proof that plaintiffs had *some right to the unobstructed flow of those waters.*

The only right of plaintiffs to the flow of the water was predicated upon *their ownership of land* upon which the water was alleged to flow when unobstructed. The plaintiffs did not in their complaint expressly allege any *right to the water*, or to the use thereof.

Upon the trial they gave no evidence of any right to the water or its use. Their sole reliance in their pleadings, as well as in their proofs, was upon their ownership of lands to which they claimed the water to be a natural and necessary incident.

If the ownership of their lands, as alleged and proved by them, did not carry with it, as a legal incident, the right to the use of the water of Kern River, the plaintiffs, when they rested, had neither alleged or proved any cause of action whatever.

Plaintiffs having alleged and proved that the State had been the owner of the land down to the year 1876, and had *subsequently* conveyed the same to them, the question to be decided is whether the conveyance at that time to the plaintiffs of the land operated to vest them with *a right to the water* of a stream which naturally flowed down to, along or upon the land.

I say that the conveyance from the State did not have that legal operation.

Where the doctrine of riparian rights prevails, a conveyance of land bordering upon a stream

carries with it, as an incident to the land, a right to the flow and use of the water. But in a State where those rights either were never recognized, or have ceased to exist, a conveyance of land has no such operation upon the adjacent water. If then, at the date of plaintiff's patents, the doctrine of riparian rights did not prevail in California, or having once existed, had been abrogated with respect *to the lands of the State*, those patents did not grant to the plaintiff's any right whatever *to the use of the waters of Kern River.* And this is just what I claim to be the fact. The lands conveyed to the plaintiffs had, while owned by the State, been divested of their riparian character and rights; and whatever connection, natural or otherwise, had ever existed between the land and the water, had been dissolved by the State while the owner of these lands.

I will assume for the purposes of this argument, that upon the adoption of the common law, the doctrine of riparian rights was legally established in this State. But this doctrine did not continue to prevail in this State, at least *as respects the lands of the State*, after the passage of the Acts of 1854 and of 1864, which I have already discussed.

If these Acts, made expressly applicable to these lands, as I have shown, did not (as I have contended) sever all connection between them and the waters which ran by or over them, then I confidently assert, that such was the effect of Title VIII, Division 2, of the Code respecting water, which was put into force and effect on the

1st day of May, 1872, by "An act to put into effect the provisions of the Civil Code relative to water rights." Approved March 27th, 1872,

I will not repeat my argument to show that neither the act of 1854 nor that of 1864, nor the title of the Code referred to, are consistent with the idea that the State of California as a proprietor of land intended thereafter to retain or assert any riparian rights respecting her own lands, or to confer such rights upon her grantees. The existence of such rights in the State or in her grantees is subversive of the whole policy of those enactments, and they are meaningless if it was the intention of the State thereafter to claim for herself or recognize in her grantees as incident to their lands such rights in the waters of running streams as are incompatible with the right of appropriation which those enactments authorized and invited. If the provision of the Code, that "*the right to the use of running water flowing in a river or stream or down a cañon or ravine may be acquired by appropriation*," was adopted with the qualification that such right should not affect the lands of the State, or should only affect them so long as they remained the lands of the State, of what practical importance was the enactment?

In his oral argument, Mr. McAllister insists that the provisions of the Code respecting the appropriation of water was intended solely to affect the public lands of the United States, the State expressly excepting her own lands from their operation by Section 1422.

In answer to a question from a member of the Court, whether the State had not, *as respects her own lands*, authorized the appropriation of water, counsel says "No, sir; it exercised that power which the Federal Government had given it under the statutes of 1866 and 1870, distinctly stating that the appropriation must be in accordance with State laws; then they made those State laws, but they never intended, as I claim, to give away their public lands by that act or to give them up as the Federal Government had done to the public."

This means that the provisions of the Code were adopted, not to carry out a public policy of the State operating upon all lands subject to such legislation, but to exercise a power delegated to the State by Congress over the public lands of the United States.

By reference to the Acts of Congress, it will be seen that no powers are given to the State by Congress over the public lands of the United States, but the public policy of the State with respect to the appropriation and use of water, as evidenced by "the local customs, laws and decisions of Courts" of the State, were made applicable to the use of water upon the public lands of the United States. If the provisions of this Code had been expressly declared to be intended to operate solely upon the public lands of the United States, these provisions would not have been such as Congress intended to adopt as defining the right of settlers on the public lands and purchasers from the United States. "The local

customs, laws and decisions of the Courts" referred to in the Acts of Congress were such general customs, laws and decisions as were the expressions of the general policy of the State respecting all waters subject to State legislation and all lands, *including the lands of the State*, which might be affected by that public policy. The exclusion from the operation of this legislation of the lands of the State would defeat the policy of prior appropriation of water as respects the lands of the United States also, for the policy of prior appropriation is incompatible with the co-existence of the doctrine of riparian rights, as respects any lands on the same stream of water.

There is no escape from the conclusion that the provisions of the Code are applicable to the lands of the State, and authorized the appropriation of water and diversion of it from those lands, not only so long as they remain the property of the State, but even after the State should have conveyed them to her grantees.

I contend that by the public policy of the State, declared in the title of the Code, which went into effect on the 1st day of May, 1872 (if not in the Act of 1854), the lands of the State were forever divested of their riparian character, and that thereafter patents of the State to such lands carried with them as incident to the land granted no riparian rights to water.

If I am right in this conclusion, the certificates offered in evidence were not proper *rebutting* evidence in the case, and could have been of no avail for the purpose for which they were offered.

The defendant, as we have seen, had proved an appropriation of the water in May, 1875, and it is claimed that these certificates were proper evidence to *rebut* the case of appropriation made by defendants. Rebutting evidence, we have seen, is "*evidence in denial of some affirmative case or fact which the defendant has endeavored to prove.*" (3 E. D. Smith's Reports, 323-4.) The only affirmative case or fact attempted to be proved by defendants was the fact of appropriation and the acts in pursuance of the Code whereby that appropriation was made legal. The certificates were not offered for the purpose of disproving a single affirmative fact proved by the defendants, and did not tend to do so.

The claim of plaintiffs is that they would have shown that *before the appropriation of the water* by the defendants, the plaintiffs or their grantors had acquired a *vested interest in their lands.*

If this be so, what affirmative fact proved, or attempted to be proved, by defendants would they have denied? The defendants had neither alleged nor proved that its appropriation of the water was prior to the plaintiffs' acquisition of vested interests in their lands. The allegation that the State continued to be the owner of the land until 1876, and that the plaintiffs acquired their lands subsequently, was the allegation of plaintiffs, accepted and admitted for the purposes of this case by defendants. The serious and insuperable objections to those certificates, as *rebutting* evidence, is—

1st. That they did not tend to deny any fact

or case made, or endeavored to be proved, by defendants.

2d. That they were offered to deny a fact which was admitted by the pleadings.

3d. That they were offered to deny one of plaintiffs' own allegations.

It cannot be consistently maintained on plaintiffs' part that their allegation as to the time when plaintiffs' right to their land accrued was immaterial, in the face of so vigorous an effort on the part of plaintiff to introduce these evidences of that time. If the fact is immaterial their evidence to establish it is also immaterial, and the exclusion of immaterial evidence cannot be error.

But for the purpose of *rebutting* the facts or case of the defendants, the time of the issuance of these certificates for the lands could have a bearing only upon defendants' appropriation of the water, and the only purpose which the evidence could serve in that respect was to show that these certificates were issued *before the defendants'* appropriation of the water. Now, waiving for the time the objections which I have specified, how could the proof of this fact affect defendants' appropriation? Suppose that before the 1st of May, 1875, these certificates had been issued to the grantors of plaintiffs, and vested in them an interest in the land, how could that fact defeat defendants' appropriation of the water? Defendants did not on the 1st of May, 1875, attempt to appropriate plaintiffs' *land*, but to appropriate the water of Kern River. The parties

here are not adverse claimants from the State of the same lands. The plaintiffs' grant was of *land*. The defendants' appropriation under the laws of the State was of *water*. There is no room or operation for a question of ~~privity~~ priority between them. If the Act of 1854, or either of them, or the Code of 1872, ~~or the Act of 1864~~ or the Act of 1864, dissolved, as I claim, all connection between the waters of Kern River and the lands of the State in Kern County, then neither certificates of purchaser nor patents from the State of any of those lands carried with them any interest in those waters. If this severance of the land and water was so effected, then the defendant, by its appropriation acquired a right to the *water* appropriated, whether the appropriation was made *before* or *after the grant by the State of the land.*

The plaintiffs offered their certificates, to show by them a vested interest acquired in their lands before the *date of defendants' appropriation* of the water, not before *the destruction of the riparian character of the lands.* This is not only apparent from the language of the offer, but from the following conclusive considerations:

1st. The plaintiffs did not at the trial, and do not now, acknowledge that the legislation referred to was intended to affect, or did affect, the riparian incidents of the lands of the State.

2nd. The certificate actually offered, ~~was~~ the particular one which was the basis of the ruling, bore date *September 30th, 1872, five months after the adoption of the Code provisions referred to.*

3rd. As evidence of the date of their ownership of the lands, *as compared with that of the legislation referred to*, the certificates would have been evidence *in chief* and not in *rebuttal*, and if so intended they would have been offered as such.

Plaintiffs did say that the certificates were offered to show that they "acquired an inchoate interest in these lands," *not in the water*, "at the date of these certificates, and the point of time we became interested in these lands;" but the reason for doing so was, that "it is *rebuttal* to the appropriation of the Calloway."

If the plaintiffs had appreciated the scope and legal effect of the legislation referred to, and had recognized the fact that no conveyance by the State, *subsequent to that legislation*, carried with the lands any riparian right to water, they would have seen the necessity of alleging and proving, in addition to their grants of land from the State in 1876, that they had acquired vested rights in the lands *before the legislation of the State had severed riparian rights from them*, and they would have perceived that the relative dates of the defendants' *appropriation* of the water, and of the plaintiffs' interest in the land were entirely immaterial.

If, after the defendant had closed its case, the plaintiffs had realized the fatal defect in their case, and the entire absence of any proof of their right to the water appropriated by the defendant, and had applied to the Court for permission to amend their pleading, and, having done so, to re-

open their case in chief, for the purpose of showing that plaintiffs' vested rights in the lands were acquired *before the adoption by the State of the policy of giving the water to the first appropriator*, the Court might, and no doubt would, have permitted the plaintiffs to do so.

Counsel for plaintiffs did not pursue this course, and they could not be expected to do so, *as it was and still is, contrary to their whole theory of the the plaintiffs' case.*

But plaintiffs, not having amended their complaint, and not having asked permission to reopen their case in chief, and having offered their certificates as *rebutting* evidence only, this Court is not called upon to consider, and it would be unprofitable to inquire, what effect upon plaintiffs' case in chief those certificates would have had, if offered and received, not merely to destroy defendant's rights as appropriator of the water, but to establish plaintiffs' superior rights as grantees of the land and of the water as incident to it.

In considering the exclusion of these certificates, the Court can *only* regard them as evidence in *rebuttal*, ignoring all consideration of them as evidence in *chief* or as to their possible effect upon plaintiffs' own case.

II.

If it was error to exclude the certificates, plaintiffs were not injured by it.

1. If the plaintiffs had neither alleged nor

proved any right to the waters of Kern River, and consequently had not made out a cause of action against the defendant, it was immaterial whether or not plaintiffs were prevented from rebutting the affirmative case made by defendant. If the certificates had been admitted and had shown that plaintiff's interest in the land was acquired before the defendant's interest in the water, of what consequence would it have been? The burden of proof was upon the plaintiffs to establish a cause of action against the defendant. They could recover only upon the strength of their own title and not upon the weakness of defendant's title. So long as plaintiffs' case was imperfect, it matters not to the defendant whether it had or made any case of defense, or whether or not defendants' case was destroyed by the *rebutting* evidence of the plaintiffs. How, then, can a plaintiff who has not made out a good case be injured by the exclusion of evidence, the only effect of which would have been to show that the defendant, as well as the plaintiff, had no right to the subject-matter of the controversy.

2. The Court has found certain facts upon which the excluded evidence could have had no bearing, which are fatal to the case of the plaintiffs.

These vital findings have been referred to at length and need not be repeated.

In considering the question of pleading in this case, the Court will keep in mind that this is not an action of ejectment in which a plaintiff need only prove title at the commencement of the ac-

tion, notwithstanding the alleged date of his seizin. If the English rule of riparian ownership had prevailed in this State, with respect to the swamp lands of the State, before and at the date of the commencement of this action, it would have been sufficient for the plaintiffs to allege and prove the acquisition of title to their land at any time before the commencement of this action. But if this rule of riparian ownership had been abrogated by law, as respects such lands, then the allegation and proof of bare ownership of said lands would not have supported a claim to the use of water flowing by or upon said lands.

My position is, that it appearing from the complaint that the premises to which plaintiffs alleged title were swamp lands, the title to which had been acquired from the State, the legal presumption was that no water rights were annexed to them even in the absence of allegations, showing that they had been acquired from the State before the adoption of the public policy of permitting the first appropriator to use the water to the exclusion of the bank owner. But when it appeared by express averment that the State had not parted with the title until years after the adoption of that public policy, it appeared that the plaintiff had no cause of action. The plaintiffs' case, as made by their proofs, was likewise fatally defective, and no offer was made to cure the defects of the pleading, or supply the deficiencies in the proofs. Under these circumstances no alleged error of the Court in excluding evidence which

was not offered to cure these fatal defects are worthy of a moment's consideration.

SIXTH.

The Court has asked that the following question, also, should be discussed upon this argument, viz.:

"Are all the facts found in findings 63, 64, 67, 68 and 69, or in any of them sufficient to justify the denial of the equitable relief prayed for by plaintiffs?"

As I understand this question, it means that if the plaintiffs have shown that their lands are riparian lands within the common law doctrine upon that subject, *and* that common law doctrine is a part of the law of this State, then are the facts found in these enumerated findings, or some of them, of such character as require a Court of equity to deny the relief for which the plaintiffs pray?

I take it that this question is not to be understood as an intimation even, that the plaintiffs are entitled to any equitable relief whatever, as based upon any other theory than the one that their lands are "riparian" lands within the meaning of the common law, and that that part of the common law is part of the law of this State, and that for the manifest reason that their bill is so framed as to place their title to *any* relief upon this one theory *exclusively*.

If I am correct in this, it results inevitably from

the findings of the Court below, which I have already discussed, that the very basis—foundation--of plaintiffs' right to any relief in this action was utterly destroyed and annihilated by these findings. When it is judicially *ascertained* that plaintiffs' lands were, and are not "riparian" lands as to the waters of Kern River, the very germ of all their title to any relief in this suit—whether that relief be legal or equitable—is *necessarily* destroyed.

And as to this question, the respondent might well stop right here and say with confidence--the foundation of plaintiffs' alleged equity being disposed of by these *vital* findings *of fact*—it is useless to prolong the controversy by the ascertainment of whether the plaintiffs had or had not done something which rendered it inequitable in them to assert their *disproved* equity. But this Court having invited a discussion of the question upon the basis that this fundamental equity *may* still exist notwithstanding the findings heretofore discussed, respect for the desires of the Court in this regard impels me to enter into the discussion of questions which I should otherwise regard as useless and immaterial.

I open this discussion then with the assertion that even if the plaintiffs' lands were at one time "riparian" lands, within the meaning of the Common Law, and even if that law upon this subject be a part of the law of this State, the findings of fact referred to in the inquiry of the Court and others germane to the same question, show that the plaintiffs are not according to the rules and

principles of equity jurisprudence entitled to any relief in this action.

And the first proposition in this connection to which I ask the attention of the Court is—that, accepting as true the theories and assumptions of plaintiffs (a), that Buena Vista slough from the point where the Kern River empties into it, *is* a water-course, and (b) that the *natural flow* of the waters of Kern River after reaching Buena Vista slough is *northward* to and upon plaintiffs' lands, still the plaintiffs are not entitled to any relief by reason of *the fact* that *the continuity of that alleged stream was destroyed by and with the consent and approbation of plaintiffs, prior to the institution of this suit*, and that by the action of plaintiffs, all riparian rights which may theretofore have pertained to their lands became vested in the Kern Valley Water Company.

According to the plaintiffs' own chosen theory of their case, their right to relief is based solely upon the riparian character of their lands and this riparian character is manifestly of that kind which may as to any given owner of riparian land and as to his *own rights only*, be severed from the land itself. Granting the existence of the Common Law doctrine of riparian rights, and there is no legal obstacle to *all* the owners of riparian lands consenting that their lands shall no longer possess the incidents of riparian ownership, and that the waters which gave their land its riparian character may be diverted therefrom and turned into other channels with the effect of attaching to the lands through which the new

channel may have its course the same identical character of riparian rights, which the same waters gave to the lands bordering upon the old channel.

As the incidents of riparian ownership at the *common law* depend upon a *natural* flow of the waters of a *continuous* stream, it is manifest that the right of a riparian owner to the preservation or use of those incidents is in equity, based upon the *natural* law which gives direction to the flow of the water.

If the riparian owner puts any obstruction in the stream, or consents to the placing of any such obstruction therein by any other person, *with the purpose of thereby diverting the water* from the course of its natural flow, he destroys not only the continuity of the stream, *but waives the protection and benefit of that very law which is the foundation of all his riparian rights.*

If the riparian owner so waives the protection of the law, by consenting to the diversion of the waters of the stream and the obstruction of its continuity, what standing has he in a Court of Equity to claim that his lands continue to be possessed of the incidents of riparian lands? Does not the riparian owner's waiver of the benefit and protection of this law necessarily destroy the *only* equity which gave his lands its riparian character?

The findings in the case at bar show that the plaintiffs here have utterly destroyed, or consented to the destruction *as to them* of the *only* equity to which they can appeal to this Court for the relief they seek, and they have transferred this equity so far as it was transferable, to the Kern Valley

Water Company. In support of this assertion I ask the Court's attention to the findings numbered 67, 68, 69, 75 and 76. The findings show the following state of facts: That in December, 1875, one Souther, with the *consent and approval* of plaintiffs (67 and 69), erected a dam across Buena Vista Slough at Cole's crossing, *south of plaintiff's lands*, which caused the waters of Kern River to *change* its *natural* flow *southerly* to Kern and Buena Vista Lakes to the *northward*, towards plaintiffs' lands; that this dam was broken in March, 1876; that in the fall of 1876 certain parties commenced the construction of two certain canals, marked on the map (being a part of the the findings) as "East Side Canal" and "Kern Valley Water Co.'s Canal;" that said canals begin at a point *south* of plaintiffs' lands; that in June, 1877, these two canals were take possession and control of by the "Kern Valley Water Company;" that the "Kern Valley Water Company" is a corporation organized under the laws of this State for the purpose of acquiring canals and water rights in Kern county, to be used and disposed of for irrigation and other purposes; that in the fall of 1877 the said "Kern Valley Water Company" reconstructed the above mentioned dam at Cole's crossing with certain levees extending eastward and westward to high land, and in the same year, with the *consent and approval* of plaintiffs (Finding 69), the same corporation constructed *another dam and levees between those at Cole's Crossing and the plaintiffs' lands, and still south of plaintiffs' lands across Buena Vista Slough*

and Buena Vista Swamp, "and thereby completely obstructed and prevented the natural flow of any water through or over said swamp northward of said last mentioned levee, and appropriated, and took possession, and control of all the waters reaching said levee, and turned the same into the said canals." That from and after the construction of said canals no water has or could naturally flow "northward beyond the head of said canals, or to or upon the said lands of the plaintiffs', or any part thereof;" and that "said canals and levee were constructed at great expense, and because of and in reliance on the said approval and consent of the plaintiffs, and but for such approval and consent would not have been constructed." (Finding 69) That the irrigation season along Kern River is from February to July. That usually during the irrigation season "there is ample and abundant water flowing down said river, not only to fill" all the canals and ditches leading therefrom, including that of the defendant, and furnish and supply to them sufficient water to irrigate the lands by them irrigated, "but also to flow to said Buena Vista Slough, *and since the construction of the dam and levee at Cole's Crossing, and the turning of the waters reaching there northward * * to wet up and thoroughly irrigate all the lands in Buena Vista Swamp, and supply water thereon for all useful and needful purposes.*" (Finding 75.)

In other words, and as briefly as I can summarize the findings themselves—it is found *that it is the dam and levees erected by the "Kern Val-*

ley Water Co.," by and with plaintiffs' consent' which keep the waters from reaching plaintiffs' lands, and not the diversion of waters by the defendant.

Can there be a clearer case of an utter destruction by a plaintiff of the very foundational equity upon which this supposed right of action is based than is afforded by these *ascertained facts?"*

The plaintiffs *consent* and *agree* to and with the "Kern Valley Water Co." that it may *destroy* the continuity of Buena Vista slough as a water-course by obstructing it in such a manner that its waters cannot longer *naturally* flow to, along or upon their land.

They not only *consent to and approve of* the placing of this obstruction in what they now say was a natural water-course, but they consent to and approve of the erection of wings to this dam to the east and west, so as to prevent the waters when dammed from flowing around the main obstruction and again reaching the bed of the so-called stream, or from reaching the lands of plaintiffs, either directly through the bed of the stream or by overflowing the surface of the country.

Plaintiffs not only give this *consent* and *approval* of the erection of these obstructions, but they are given *for the purpose* of enabling the "Kern Valley Water Co." to appropriate and take possession "and control of ALL the waters reaching said levee" and turning the same into its canal.

It is manifest, from these findings, that if the defendant diverted *no* water from Kern River, that no part of the water which it does divert

could, by possibility, reach plaintiffs' lands. It would be obstructed in its flow through Buena Vista Slough and Swamp by the dam and levee of the Kern Valley Water Co., and turned into its canals. And this fact is made clear by the size and capacity of the respective canals, as found by the Court. The size and capacity of the defendants' canal is found in finding No. 57, folios 420 *et seq.*, of Vol. I of the Record. Its capacity is found to be a little more than 600 cubic feet of water per second. The size and capacity of *one* of the canals of the "Kern Valley Water Co.," viz., that known as the "Kern Valley Water Co.'s Canal," is found in Finding 68, folios 440 *et seq.*, of Vol. I of the Record, to be *more than 1200 cubic feet of flowing water per second, or more than double the capacity of defendants' canal.*

If the defendant was enjoined from diverting the water, and was compelled to close the head of its canal, as prayed for by plaintiffs, the decree could be of no possible benefit to plaintiffs, in their *capacity of riparian owners* of the lands described in the complaint. The decree will only operate to the benefit of the "Kern Valley Water Co." Is this action prosecuted for the benefit of the "Kern Valley Water Co."? *These findings necessitate this conclusion*—and the conclusion is fortified by the testimony of plaintiff Crocker, that plaintiffs are stockholders in the corporation and contributed to its construction (Record, Vol. 2, folio 617 to 635). I submit that these findings show so conclusively that the plaintiffs, *as riparian owners,* have not been damaged by the diversion

complained of, and could derive no benefit from their success in this action, that the conclusion is not only fairly deducible, but irresistible, that this action is prosecuted solely for the benefit of the "Kern Valley Water Co." If this be so, it results that the plaintiffs have no *equity* to be conserved by a decree, and that the defendant is entitled to have this action dismissed, for the reason that it is not prosecuted "in the name of the real party in interest." (Sec. 367 of the Code of Civil Procedure.)

It is worthy of observation and the consideration of the Court that this appropriation by the "Kern Valley Water Company" is something altogether and entirely different from an appropriation of the water by the plaintiffs *as* riparian owners. Granting that a riparian owner may divert the water from its natural channel, this is not such a case as that. Here the "Kern Valley Water Company" is not the riparian proprietor. That corporation was evidently formed in view of the statute in this State allowing an appropriation of water (Record Vol. I, folio 441–3). And its appropriation has been made by that authority and not as a riparian proprietor.

It is only *when* a private individual has been "*injured*" by a nuisance that he can maintain any action either for the recovery of damage or for its abatement. If the acts which are complained of as a nuisance did not exist or were abated, and the *condition* of the plaintiff would continue the same as while the acts existed and before they were abated, it is manifest that the acts com-

plained of do not cause any *injury* to the plaintiffs, and the plaintiffs are not in a condition which would entitle them to maintain any action in relation thereto.

It is evident from these findings that if the canal of defendant's was closed so that it could not divert a drop of water from Kern River, the existing dams and levees of the Kern Valley Water Company *between the mouth of defendant's canal and the nearest point of plaintiffs' lands* would divert the water of the river away from what is claimed to be its natural course and plaintiffs' land. It necessarily follows that the acts of diversion of which plaintiffs complain do not cause any *injury* to plaintiffs.

We are not without a direct authority upon this proposition:

Bear R. & Auburn W & M Co. vs. *Boles No. 2*, 24 Cal., 359, was an action to abate a nuisance caused by the defendants' alleged diversion of the waters of a stream. Both parties claimed as appropriators, the plaintiff having a prior appropriation. Upon the trial it was proven that plaintiff's ditch, through which it took the water by it appropriated, had been allowed to become in such a condition that it could not take the water from the stream, even if defendant had not diverted it; and this Court held that this fact constituted a perfect defense to the action, saying (page 362):

"The question was whether the reservoirs (of defendant) were a nuisance in the *then condition of things*; not whether they *might* become a nuisance at some future time, when the plaintiff

might put its ditches in a condition to enjoy its right to the water. The plaintiff only had a right by virtue of its prior appropriation to the use of the water in its natural flow; other parties above were equally entitled to its use as long as it was used in such a manner as not to injure the plaintiff. If plaintiffs' ditch and dam had for seven years, *or any less period of time*, as defendants claim, been in such a condition that it was impossible to turn the water into the ditch, or for the ditch to carry it, *the plaintiff could not be injured* or the reservoirs become a nuisance *until the ditch should be repaired* and placed in a condition to be available for the purpose designed."

This case covers the case at bar as with a blanket. There the plaintiffs' means of the use of the water was a ditch. Here the plaintiffs' means of the use of the water is the alleged natural water-course of Buena Vista Slough.

There the ditch had become unavailable for the purpose of carrying the water.

Here Buena Vista Slough was so obstructed, and with *plaintiffs' consent*, that it was unavailable to carry the water to plaintiffs' lands.

In the case cited, the Court further say :

" An action could not be maintained to abate the reservoirs as a nuisance *till they actually became such.* There is no claim that the plaintiffs were entitled to or desired the water for any other purpose than to convey in their ditch for sale."

And so in the case at bar, the defendants' diversion could not become a nuisance " till they actually became such ; " that is, until the defendants'

diversion *actually injured* the plaintiffs *in their capacity* of riparian owners. In the case at bar, "there is no claim the plaintiffs were entitled to or desired the water for any other purpose" than such as was incident to their alleged position as riparian owners. No pretence is made in the bill that plaintiffs claim these waters for the benefit of the "Kern Valley Water Company." Their whole claim is based upon a right to have these waters flow *past and below* the existing obstructions placed in the so-called stream, *with their consent*, by the "Kern Valley Water Co." Plaintiffs' usufruct right to the waters, according to their own theory, do not attach until these waters *have passed these obstructions*, and as long as these obstructions exist, the defendants' diversion could be no nuisance to the plaintiffs. As long as these waters are prevented by these obstructions from reaching plaintiffs' lands, the diversion by defendants does not, and cannot, injure plaintiffs *as riparian owners*.

In *Nevada Co. and Sacramento Canal Co.* vs. *Kidd*, 37 Cal., 307, the Court say:

"There is no averment that the plaintiffs ever *in fact* diverted the waters of Yuba River, or actually applied them to any use whatever, *or that it ever was or that it is yet in a condition to divert or use the water*; or that it could in any way use it until plaintiff constructs a dam and canal which are now only in process of construction. Of course, till the plaintiffs can use the water itself, it can be no injury for others to use it. The Court

will not restrain the mere diversion of the water by others till the plaintiffs can make some possible use of it."

The rule seems to be well established, "where the injury complained of is not *per se* a nuisance, but may or may not become so according to circumstances, and where it is uncertain, indefinite, or contingent, or productive of only *possible* injury, equity will not interfere by granting an injunction" (High on Injunctions, Sec. 488).

It is certain that defendants' appropriation and diversion is not *per se* a nuisance. If the defendant even took all the water in the stream at the mouth of its canal, and accepting plaintiffs' own theory of the law, the defendant's acts would not be a nuisance to plaintiffs, if that same water, if it had not be taken by defendant, could not reach plaintiffs lands. And if it *might* not have reached plaintiffs' lands or if whether it could or might reach plaintiffs' lands depended upon the "contingency" of the demolition or removal of the obstructions placed in Buena Vista Slough by the "Kern Valley Water Co.," then the act of the defendants was not created an "*actual*" but *only* a *possible* injury which a Court of equity will not enjoin.

If *any* appropriation or diversion of the waters of Kern River directly affects the riparian character of plaintiffs' lands, does injure the plaintiffs in their character of riparian owners, it is manifestly that made by the Kern Valley Water Company. If the appropriation and diversion made by the defendant injures any one, it is the Kern

Valley Water Company, and not the plaintiffs. As between the defendant and the Kern Valley Water Company, all of the equities are with the defendant. They are both appropriators under the statute. The defendant's appropriation had its inception in May, 1875 (Record Vol. I, Folio 410, *et seq.)*, the Kern Valley Water Company's in June, 1877 (Folio 441). In a contest between these two corporations the Kern Valley Water Company would have no standing whatever in this Court. Is it *equitable* that the plaintiffs, after having severed their lands from the waters in question in favor of the Kern Valley Water Company, should be permitted to allege the riparian character of their lands in a controversy with this defendant for the benefit of the Kern Valley Water Co.? There stands the last named corporation's canals with gaping mouths ready to receive the waters which this Court may require the defendant to exclude from its canal before it can reach the plaintiffs' lands, and to divert it away from its alleged natural channel and the plaintiffs' land—*with plaintiffs' consent*—and to appropriate it to exactly the same character of use for which it is now appropriated by the defendant. In other words, the real contest here is not between plaintiffs and the defendant, *but between the Kern Valley Water Co. and the defendant.* If they were the only parties to the record, their rights would be adjudicated by the statute of this State, and the Kern Valley Water Co.'s appropriation being two years and more the junior of defendant's appropriation, the defendant's rights

in the premises would be unassailable. This difficulty is appreciated by the Kern Valley Water Co., and in order to evade the law of the State—to enable it to obtain an advantage over the defendant which the statute confers upon the defendant by reason of its priority of appropriation—the litigation is prosecuted in the name of plaintiffs *as* riparian owners, although plaintiffs had already parted with all their riparian rights to the Kern Valley Water Co.

The plaintiffs are attempting to use their *parted-with* rights as riparian proprietors in aid of their grantee of those rights. Is this coming into a Court of Equity with clean hands? Is this attempt to confer upon a junior appropriator rights superior to an older appropriator, who has the superior rights under the laws of the State, under the guise that the plaintiffs were riparian owners, and where it is shown that they have voluntarily deprived their land of its riparian character, consistent with equity and good conscience? I submit not.

That the plaintiffs *had* severed from their lands any and all incidents of riparian ownership was virtually admitted by Mr. McAllister upon the oral argument. He then stated, in substance, that there were 200,000 acres of land in Buena Vista Swamp. Of this 40,000 acres was owned by the plaintiffs; that the Kern Valley Water Company was formed by the owners of the whole 200,000 acres of swamp land, each two acres of swamp land representing one share of the capital stock of the Water Company.

There is and can be no pretense that *all* of this 200,000 acres of swamp land is *riparian* or bank land, but the evident purpose of this suit is to give the owners of all of this swamp land, which is not *riparian* land, the same advantages which it would possess if it were *all* bank lands.

In other words the plaintiffs, by their arrangement with their co-stockholders in the Kern Valley Water Company, vested them and each of them (through the medium of that corporation) whose lands were not *bank* lands, with a part of those *incidents* which they here claim for their own land by virtue of the latter being bank lands.

The rights which they claim *as* and *by virtue* of their ownership of riparian lands, and as an *incident* to those lands, they separate from the land itself by giving other persons a *four-fifths* interest therein, without giving them any interest whatever in the lands themselves. This *incident* of riparian ownership, upon their own theory, exists *only* as an *appurtenance* of their land. This appurtenance is separated from the land by being turned into *personal* property—the stock of a corporation—and this personal property is held independently of the title to the land itself; it must have, thereupon, ceased to be appurtenant to the land. Suppose the plaintiffs' stock in this corporation was sold under process of law, would its purchaser have been a *riparian* owner, as to the waters of the Kern River? And if such a purchaser would *not* have been such a riparian owner, in what better situation can the plaintiffs possibly stand?

If the plaintiffs sold their lands, or if it were sold under process of law, would the purchaser *thereby* become the owner of the stock of this corporation ?

If the common law doctrine of riparian rights is the law of this State, does it exist to the extent that a riparian owner may divest his lands of the right to the use of the waters of a stream in favor of a junior appropriator under the statute of the State and still assert riparian rights in order to deprive an older appropriator, under the same statute, of the water, for the benefit of such junior appropriator ?

The consent and approval given by the plaintiffs to the construction of its works by the Kern Valley Water Company was co-extensive with the purposes of those works, and these purposes are found to have been the diverting "of all water reaching said levee into the said canals, and such levee does entirely obstruct, and, since its construction, has obstructed the natural flow of *any* water Northward in said Buena Vista Swamp beyond said levee, and diverts *the same* into said canals, and that the plaintiffs, at and before the construction of the said levee *knew of the purposes thereof*, and approved the same, and knew of the beginning and prosecution of the construction thereof, *and consented to and approved of such construction.*" (Finding 69, folios 444–5.)

The cause now before the Court is a case in equity. Now, to whom does this finding show that *all* the waters which may reach the Kern Valley Water Co.'s levee belong—the plaintiffs or

the Kern Valley Water Co.? In a contest between these plaintiffs and the Kern Valley Water Co., could there be any room for doubt that *all* these waters were, as between the parties, the property of the Kern Valley Water Co.?

Finding 68 (folio 443), shows that the Kern Valley Water Co. "*took possession*" of "*all* the waters reaching said levee and turned it into" their canals in 1877. This possession, taken by *consent* of the plaintiffs, created at least an equitable title, and this equitable title has ripened into an indefeasible legal title, as against the plaintiffs, by lapse of time.

If riparian rights, as known to the common law, exist in this State, they exist by virtue of law. In other words, if these rights exist, they have been created by law for the protection, benefit and advantage of owners of land of given situations. Is, or can there be, any difference between the protections, benefits and advantages secured by these laws, and protections, benefits and advantages derived under and secured by any other law?

There is no doctrine of the law more firmly established than the one which provides that he who is entitled to the protection, the benefit or the advantage of *any* law, statutory or constitutional, may *waive* the legal protection, benefit or advantage to which he may be entitled in all cases when a waiver thereof would not be contrary to public policy.

Now, this *consent and approval* which it is found

that the plaintiffs gave to the appropriation and diversion of the waters in question by the Kern Valley Water Co. is as plain and unequivocal a *waiver* by the plaintiffs of any rights which they might have had under the Common Law doctrine of riparian rights as can well be imagined. The waiver certainly was not opposed to the public policy of the State as enunciated by the statute which authorizes an appropriation of water.

Is there then any counter-principle or doctrine of the law which forbids the application to these facts of this now thoroughly established doctrine of the law that a party may waive the protection or benefit of any law which was intended for his protection and benefit? I do not believe that any such principle exists.

I therefore submit that the defendant has a right to ask this Court to apply this well-known and indisputable rule of law to these facts and to hold that by reason of this consent and approval given by the plaintiffs that they have waived *any* right which they may have had to appeal to the Common Law doctrine of riparian rights as a means of protection against the diversion, of which they now complain.

In further consideration of the question as to the sufficiency of the findings to justify the denial of the equitable relief prayed by plaintiffs, I ask the Court's attention to Findings 75 and 76. (Record, Vol. 1, folios 454-458.)

These findings establish the following propositions:

1st. That the irrigation season along Kern River is from February to July.

2d. That *usually* during that season there is an abundance of water in the river to supply *all* the canals heading thereon — including defendants'—and to leave an abundance in the river to flow to and upon plaintiffs' lands since the erection of the obstructions at Cole's crossing altered the natural flow of the water.

3d. That during the irrigation season the amount of water diverted by defendant does not materially affect or diminish the volume of water usually reaching Buena Vista Slough. And,

4th. That during the balance of the year none of the water diverted by defendant would, if not so diverted, ever in its natural flow, flow to or reach plaintiffs' lands, or any part thereof.

During the five months of February, March, April, May and June, these findings establish that after defendants have taken all the water from the river which its canal can carry, there is a great abundance left to "thoroughly irrigate all the lands in Buena Vista Swamp and supply water thereon for all useful and needful purposes." (Finding 75.)

The defendant's diversion, then, for those months, *cannot* injuriously affect plaintiffs. The defendant's acts for those months cannot be a nuisance to plaintiffs, and cannot afford the foundation of any right of action of any character whatever in favor of plaintiffs against the defendant.

During the other seven months of the year

these findings establish the fact that if defendant diverted no water from the river, *none* of the water which would flow past the head of its canal *could* reach plaintiffs' lands in its natural flow. It necessarily follows then that the defendant's act of diversion does *not* injure the plaintiffs. The findings cover the whole year—and no moment of time is left in which the defendant's acts could injuriously affect the plaintiffs. Where, then, is there left a scintilla of equity to authorize them to complain of defendant's acts ?

If the defendant has been guilty of a public nuisance, the plaintiffs certainly have no right to complain unless they are especially and exceptionally affected thereby, and these findings show that they are not peculiarly, specially or exceptionally affected.

I do not suppose that there is any pretense that there is not *some* evidence in the record to support these various findings.

SEVENTH.

Upon the former argument of this cause, counsel for the defendant made the point *that the plaintiffs had lost their right to the equitable relief they seek in this action by reason of their laches in making complaint of the acts of the defendant of which they now complain.*

In response to this point the prevailing opinion, after the former hearing, says :

"Unless the plaintiffs were estopped, and the Court does not find that they were, by reason of their acts and conduct, while the defendant was constructing its works for the diversion of the water of Kern River, from complaining of such diversion, the findings that the plaintiffs knew of the intention of defendant to divert such water before any was diverted, and of the construction of works by defendant for that purpose, but made no objection to the operations of defendant before the commencement of this action, are irrelevant. The facts found do not, in our opinion, constitute an estoppel, and if not, the plaintiffs had the full statutory period within which to commence their action."

It is true that the Court does not in its findings expressly say that the plaintiffs were estopped by reason of their acts and conduct, but the Court finds what were their acts and what was their conduct, and defendant was entitled to the legal effect of such acts and conduct, whatever it was. If the legal effect was to estop plaintiffs then they were estopped. If the legal effect was to charge plaintiffs with fatal laches, defendant could avail itself of such laches. The legal effect was both to estop plaintiffs and to convict them of laches. The facts found by the Court were very similar to those which were held to operate as an estoppel in the case of *Park* vs. *Kilhan*, 8 Cal., 78. The legal effect of these facts was to establish laches also on the part of plaintiffs.

I respectfully submit that the great pressure of business in this Court has led the Court to over-

look the great distinction and difference between the point as made by counsel, and the point to which the extract quoted is a reply.

The doctrine of "estoppel" is one thing. The application of the Statute of Limitations is another and an entirely different thing; and the doctrine of "laches" is a separate and distinct thing from either of the others.

That a party may be "estopped" by acts which do not amount to or involve "laches" will not be denied.

That a party may be guilty of "laches" without having created any "estoppel," is equally true.

The statute of this State defines an estoppel *in pais* to be, "whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation, arising out of such declaration, act, or omission, be permitted to falsify it."

(Subdivision 3 of Sec. 1962, Code of Civil Procedure.)

This "estoppel," as so defined, is a defense either at *law* or *in equity*.

The doctrine of "*laches*," upon the contrary, is available as a defense *only* in equity—or, if available at all at law, *only* as an *equitable* defense.

The object and purpose of an "estoppel" is to shut the mouth of a party litigant, and to prevent his proving the truth of a given fact. "Laches" excludes no evidence, but is a doctrine which ap-

plies itself to proven facts and results in the conclusion that, according to those facts, a certain judgment or decree would be *inequitable.*

The doctrine of "laches" is a part of, and is included within that fundamental and all-pervading doctrine of equity jurisprudence that "he who seeks equity must do equity."

A man by his acquiesence in a given state of things, and by his delay in asserting equitable rights which he may possess to have that state of things changed or altered, may so encourage another man to expend his money upon the assumption that that given state of things is legal and right, as to forfeit his equitable right to have that state of things changed or altered without having been guilty of doing, or omitting to do, anything which would create an "estoppel," and this would bring into operation the doctrine of "laches."

While the language of the prevailing opinion which I have quoted in relation to this matter is susceptible of the construction that this doctrine of "laches" no longer constitutes an equitable defense, I hardly think it was the intention of the Court to make such an enunciation.

That "equity aids the vigilant, and not those who slumber on their rights," is a maxim of jurisprudence of too much practical value to be surrendered and abolished without any consideration whatever, and upon the simple statement that the facts relied upon for its application do not bring the case within either the Statute of Limitations or the doctrine of "estoppel," when it is said that

nothing can call forth the activity of a Court of equity "but *conscience, good faith*, and *reasonable diligence*"—a statement which is itself axiomatic—the one of these elements is as indispensable as are the others.

If the complainant has so acted that the demands which he makes upon the Court are not consistent with "good faith," his complaint is destitute of that equity which must exist in every application to a Court of equity; if the complainant has *unreasonably delayed* in his application for the relief he seeks, his bill is destitute of that good conscience which is indispensable for the exercise of the jurisdiction. If a complainant has so acted that he has encouraged any one else to do anything which would result in his injury or loss if the state of things are changed at the suit of the complainant, then the complainant has not acted in "good faith." If a complainant, by his delay in the assertion of his rights, or supposed rights, has given his adversary reason to suppose that he (the complainant) did not intend to assert any such rights, he has not acted with "reasonable diligence," and if he now asserts those rights to the injury or loss of his adversary, he is acting contrary to the requirements of good "conscience." In both cases the doctrine of "laches" affords a defense to the injured party.

I think that these principles will be found to be most amply supported by the authorities which are collated in the printed argument filed on behalf of the defendant upon the former hearing at page 144 *et seq.* I ask the Court to apply these

principles to those findings of the Court below relative to the appropriation and diversion here complained of—findings 51 to 64 inclusive (Record, Vol. I., folios 410 to 435), and especially to findings 63 and 64.

These last finding are as follows :

"That from, during, and at the time when the acts in these findings set forth as constituting the appropriation and diversion by the defendant and its grantors were done, the plaintiffs, and each of them, knew, and were informed thereof, and knew and were fully and correctly informed of and concerning the intention of the defendant and its grantors to make said appropriation, and of the extent and purpose thereof, and knew that, in reliance upon the acquisition of the right to said water so appropriated, the defendant was expending, would expend, and had expended the large amounts herein found in the construction of its said works, and that in like reliance, third parties were about to expend, and did expend much money and labor in irrigating and cultivating the said lands along the route of said Calloway Canal; and were fully informed of all the circumstances surrounding and attending the location, construction and maintenance of said canal and works of defendant, and of the character of said lands; and that if prevented from using said water so appropriated, all the said labor, expenditure, and effort of the defendant would be fruitless and a total loss; and that the plaintiffs, until the commencement of this action, made no objection

to the said appropriation or acts of the defendant, *but acquiesced therein,* and stood by while the defendant, from the year 1875, to the said 12th day of May, 1879, continued the construction of said canal, and diverted the waters of Kern river through the same every year during the period last aforesaid, and applied the same to the irrigation of said lands; that the said period during which the plaintiff's so neglected and delayed to notify the defendant of their claim to said water, or assert or prosecute whatever rights they had in the premises, was an unreasonable delay, and that the plaintiffs were thereby guilty of gross neglect, and long and unreasonable delay and laches."

"That the plaintiffs had actual knowledge of the proposed construction of the Calloway Canal, and of the purpose thereof, as herein found, before the same was commenced, and knew of the commencement of the construction thereof at the time such construction began, and knew of the proposed dimensions thereof, and of the continuous construction thereof, as hereinbefore found, *and made no objection thereto, but acquiesced therein from the time of the commencement of said construction to the time of filing their complaint in this action.*"

I submit that these two findings do show that the plaintiffs *acquiescence* in the acts of which they here complain, and their delay in asserting their supposed rights will be accompanied by such serious losses to the defendant and others, if they have the relief which they seek, that the doctrine of "laches" should and does afford a perfect defense to this suit.

In any possible view that may be taken of this case, I submit that the judgment of the Court below must be affirmed.

N. B.—Since the foregoing was prepared, Mr. Houghton, of counsel for plaintiffs, has informed me that he should rely in this case upon the Act of the Congress of the United States, "providing for the sale of the lands of the United States in the territory Northwest of the River Ohio, and above the mouth of Kentucky River." Approved May 18, 1796. (Vol. 1, Statutes at Large, p. 464.

I presume it is Sec. 9 of that enactment upon which counsel rely, and which is in the following words:

"That all navigable rivers *within the territory to be disposed of by virtue of this Act* shall be deemed to be and remain public highways. And that in all cases where the opposite banks of any stream, not navigable, shall belong to different persons, the stream and the bed thereof shall become common to both."

As to this enactment, I beg to suggest:

1st. That it has no more application to lands in California than it has to lands in the moon. And this particular section is in terms limited to the lands, which *that Act* provides for the sale of.

2nd. That if that Act could be held to apply to lands in this State, it is necessarily fatal to the pretensions of the plaintiffs in this case, inasmuch as plaintiffs have, according to Mr. McAllister's statement in his oral argument, (and which I have heretofore referred to in connection with the De Weber road-crossing matter) proved *that Buena Vista Slough is a navigable stream.*

Service of a copy of the within is hereby admitted this Twentieth day of April, 1885.

Mc Allister & Beggs

Stetson Haughton &

Attorneys for Appellants.